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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

TEACHERS INSURANCE AND ANNUITY ASSOCIATION
and COLLEGE RETIREMENT EQUITIES FUND,

Petitioners,

—v.—

DIANA L. SPIRT, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

Petitioners are independent insurers which provide annuity contracts to employees of colleges and universities through insured pension plans. Prior to this Court's decision in *Arizona Governing Committee* v. *Norris*, 103 S. Ct. 3492 (1983), each contribution to those annuity contracts purchased lifetime benefits which differed on the basis of age and sex. In response to this Court's decision in *Norris*, petitioners altered their contracts so that future contributions would purchase lifetime benefits on a sex-neutral basis. Notwithstanding this change over (effective August 1, 1983), the Court of Appeals, on remand in light of *Norris* (103 S. Ct. 3565), ordered that all past contributions, whenever made, must purchase sex-neutral benefits for all persons retiring after May 1, 1980. The questions presented are:

1. Whether an order requiring that all pre-August 1, 1983 contributions to TIAA-CREF must purchase annuity benefits calculated on a sex-neutral basis (thereby reducing the retirement benefits of men) violates the equitable principles governing retroactivity enunciated by this Court in *Norris*.

2. Whether under Title VII, which is applicable only to employers and their agents, relief may be granted against third-party insurers when such insurers have no employer-employee relationship with their annuitants and the annuitants' employer has no control over the insurers' use of mortality tables.

3. Whether the protection from unintended federal intervention into the "business of insurance" provided by

the McCarran-Ferguson Act (15 U.S.C. §§ 1011, *et seq.* (1982)) is limited, in effect, only to federal antitrust legislation.

PARTIES TO THE PROCEEDING

In addition to the petitioners* and respondent listed in the caption, the following were parties in the court below: Long Island University; James P. Corcoran, in his capacity as Superintendent of Insurance of the State of New York (successor to Albert B. Lewis, the former Superintendent of Insurance); the Equal Employment Opportunity Commission (intervenor); and American Association of University Professors (intervenor).

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* Pursuant to Rule 28.1 of this Court, petitioners state as follows: (1) *Parents*. All of TIAA's capital stock is held by Trustees of TIAA Stock, a not-for-profit, non-stock, New York membership corporation. CREF itself is a not-for-profit, non-stock, New York membership corporation. Seven persons serve both as members of CREF and of Trustees of TIAA Stock. (2) *Non-wholly owned subsidiaries and affiliates*. TIAA owns 50% of the issued and outstanding stock of North Coast Investment Corporation, a Delaware corporation.

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DIANA L. SPIRT, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners Teachers Insurance and Annuity Association and College Retirement Equities Fund ("TIAA-CREF") respectfully pray that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Second Circuit dated September 29, 1982 (*vacated and remanded*, 103 S. Ct. 3565 (1983)), and the Judgment and Opinion of that Court entered on remand on May 21, 1984, which reinstated and affirmed the Judgment and Opinion of September 29, 1982.

OPINIONS BELOW

The May 21, 1984 opinion of the Court of Appeals (reported at 34 Fair Empl. Prac. Cas. (BNA) 1510) and the September 29, 1982 opinion of the Court of Appeals (reported at 691 F.2d 1054) appear in the separately bound Appendix filed with the Petition.[1] In addition to its Judgment, the District Court issued five opinions in this case (all of which appear in the Appendix): (1) January 23, 1976 (not officially reported); (2) July 1, 1976 (reported at 416 F. Supp. 1019); (3-4) August 9 and September 12, 1979 (reported at 475 F. Supp. 1298); and (5) March 19, 1982 (on limited remand; reported at 93 F.R.D. 627).

JURISDICTION

The Judgment of the Court of Appeals for the Second Circuit was filed on May 21, 1984. This Petition has been filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) (1982).

STATUTES INVOLVED

Involved herein are:

1. Section 703(a)(1) of Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e-2(a)(1) (1982)) which in pertinent part provides:

> It shall be an unlawful employment practice for an employer -

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1 Citations herein to material printed in the Appendix appear as "__a."

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin. . . .

2. Section 2(b) of the McCarran-Ferguson Act, 15 U.S.C. § 1012(b) (1982), which in pertinent part provides:

> No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance. . . .

The full text of these provisions, and other relevant portions of Title VII, the McCarran-Ferguson Act, and the Portal-to-Portal Act (29 U.S.C. § 259 (1982)) are set out in full in the Appendix.

STATEMENT OF THE CASE

A. Description of the Parties and the TIAA-CREF Annuity System[2]

Petitioners TIAA and CREF provide a variety of insurance products, principally annuities, for employees of educational and research institutions through insured pension plans. TIAA, a non-profit legal reserve life insurance and annuity company organized under New York law in 1918, offers fixed dollar annuities. CREF, a not-

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2 The facts were either largely stipulated to or were contained in uncontested affidavits filed by TIAA-CREF. Citations herein to material contained in the Joint Appendix filed below appear as "JA__."

for-profit corporation created in 1952 by a special act of the New York legislature as a companion organization to TIAA, offers variable annuities. 13-15a. Both TIAA and CREF are closely regulated by the New York State Insurance Department and are subject to the New York Insurance Law. JA185.

Respondent Diana Spirt is a tenured professor at Long Island University ("LIU"). Tenured LIU faculty are required to participate in the University's retirement plan which is funded by contributions made, by and on behalf of such faculty, to TIAA and CREF annuity contracts. 13-14a. Those contributions are equal for all similarly situated men and women, and result in equal accumulations at retirement. JA175.

The annuity contracts involved are between each individual participant and TIAA-CREF, not with the employer LIU. JA174. Neither LIU nor any other participating institution has authority or control over the terms of the TIAA-CREF contracts or over TIAA-CREF's mortality tables or rate schedules, which must be submitted to, and receive the approval of, the New York State Superintendent of Insurance. JA174, 180-83. More than 700,000 persons presently have contracts with TIAA-CREF and more than 3,400 institutions have TIAA-CREF retirement plans. Contributions are immediately vested and credited, as received, to individual accounts established for each employee by TIAA-CREF, from which accounts benefits are ultimately paid. JA175.

TIAA-CREF's studies of its own annuitants' lives, and every other similar study known to them, show that at every age, the male mortality rate is greater than the female mortality rate. JA180-82. At the time the contributions of the men here in issue were made, the annui-

tants' contracts stated that the factors of age and sex would be used by TIAA-CREF in setting the amount of annuitants' retirement benefits. *See, e.g.*, JA497, § 7; JA505, § 7.

Because women live longer than men, if equal periodic benefits are to be paid to all annuitants, an infusion of additional money to pay for women's increased benefits is required. There are only two available sources from which that money may be secured: (1) the employers of the women—by requiring them to pay greater premiums on the women's behalf, or (2) the men in the TIAA-CREF system—by requiring them to surrender a portion of the retirement benefits which they would otherwise receive. JA131-32.

B. Proceedings Below

Plaintiff brought this action in 1974 alleging that TIAA-CREF's use of sex-distinct mortality tables violated, *inter alia*, Title VII and 42 U.S.C. §§ 1981, *et seq.* JA14. The jurisdiction of the district court was invoked under Title VII, as amended (42 U.S.C. §§ 2000e, *et seq.*), the Civil Rights Act of 1870 (42 U.S.C. §§ 1981, *et seq.*), the Fair Labor Standards Act, as amended (29 U.S.C. § 206(d)), and under 28 U.S.C. §§ 1331 and 1343. JA14.

In an opinion dated August 9, 1979, the district court granted summary judgment in favor of TIAA on the ground that the McCarran-Ferguson Act rendered Title VII inapplicable to the subject risk classification activities of that insurer. 64a. Holding that CREF is not engaged in the "business of insurance" within the meaning of that Act, the court applied Title VII to CREF and found that its use of sex-distinct mortality tables violated Title VII under the rationale of *Los Angeles Department of Water & Power* v. *Manhart*, 435 U.S. 702 (1978). The court

enjoined CREF, on and after May 1, 1980, from using sex-distinct mortality tables in calculating the benefits to which participants would be entitled at retirement. Finally, the court also enjoined LIU from contributing, or requiring its employees to contribute, to any retirement plan which used sex-distinct mortality tables in the calculation of periodic benefits. All parties filed notices of appeal from this decision.

In February 1981, Albert B. Lewis, then Superintendent of Insurance of the State of New York, was made a supplemental defendant to this proceeding (then before the district court on limited remand) by reason of his rejection, as inconsistent with New York law, of a merged-gender, *i.e.*, "unisex," mortality table proposed for prospective use by TIAA-CREF. JA442. Plaintiff's complaint against the Superintendent was dismissed by the district court in its opinion of March 19, 1982. 135-36a.

On September 29, 1982, the Court of Appeals affirmed the district court's holding as to CREF, but reversed the finding that the McCarran-Ferguson Act exempted TIAA from Title VII liability. 11a. The Court also held that the required "equalization" in annuity benefits ordered by the district court was not impermissibly retroactive. Such equalization was endorsed even though it was to be accomplished by reducing the benefits of the men derived from contributions made by them in the past.

C. Prior Proceedings in This Court

1. Petition for Certiorari in *Spirt*

On November 9, 1982, TIAA-CREF filed a Petition for Certiorari seeking review of the Second Circuit's Septem-

ber 29 decision. Petitioners also requested that, should the writ be granted, *Spirt* be set down for oral argument on the same date as *Norris*. TIAA-CREF Pet. Cert. at 13. The Court denied this request.

2. Petition for Certiorari in *Peters* v. *Wayne State University*

On October 14, 1982, the Sixth Circuit delivered its opinion in *Peters* v. *Wayne State University*, 691 F.2d 235 (151a), finding, in factual circumstances indistinguishable from those in *Spirt*, that neither TIAA-CREF nor the employer Wayne State University had violated Title VII. The plaintiffs in *Peters* also sought certiorari, and urged the court to grant "in tandem" review of *Peters* and *Norris*. The Court also denied this request.

3. The Decision in *Norris* and the Remand of *Spirt* and *Peters*

On July 6, 1983, this Court held in *Norris* that Arizona's deferred compensation plan violated Title VII and ordered that all benefits derived from post-August 1, 1983 contributions must be calculated on a sex-neutral basis. 103 S. Ct. at 3493. However, this Court refused to order any lifetime annuity benefits derived from pre-August 1, 1983 contributions to be treated in any way other than in the sex-distinct manner hitherto provided for in the Arizona plan, because to do otherwise would be "both unprecedented and manifestly unjust." 103 S. Ct. at 3509 (Powell, J.).

On the same date as its decision in *Norris*, this Court granted the pending petitions for certiorari in *Spirt* and *Peters*, vacated the decisions, and remanded the actions

for further consideration in light of *Norris*. 2a and 103 S. Ct. at 3565, 3566.

D. TIAA-CREF's Change Over to Sex-Neutral Benefits Derived From Post-August 1, 1983 Contributions

Shortly after this Court's decision in *Norris*, TIAA-CREF altered its method of calculating retirement benefits so as to enable the college and university employers with TIAA-CREF funded retirement plans to comply with that decision. 3a. Thus, each contribution applied to TIAA or CREF annuities on or after August 1, 1983 (the effective date of the judgment in *Norris*) has purchased retirement benefits without regard to the sex of the beneficiary. This change in the method of calculating benefits derived from post-August 1 contributions was accomplished through the use by TIAA-CREF of merged-gender mortality tables. Benefits derived from pre-August 1, 1983 contributions continue to be determined on a sex-distinct basis.

E. The Decision of the Second Circuit on Remand

Notwithstanding TIAA-CREF's announced decision to begin paying sex-neutral benefits to the extent derived from post-August 1 contributions, plaintiff and others moved in late July 1983 for reinstatement of the retroactive relief granted in the Second Circuit's pre-*Norris* opinion and judgment. On May 21, 1984, the Second Circuit granted those motions and, with one minor modification, reaffirmed its earlier decision of September 29, 1982. 9a. That decision would, if not reversed, require TIAA-CREF to pay sex-neutral retirement benefits to all persons retiring after May 1, 1980, regardless of when the

contributions from which those benefits are derived were made, even contributions made long before the passage of Title VII.

The court below repeatedly expressed its uncertainty as to *Norris*' intended meaning on the question of relief. 7-8a. Nonetheless, it held that because its decision would impose no burden on the employers in the TIAA-CREF system, *Norris* "did not intend to bar retroactivity in the circumstances of this case," even though that result would "unquestionably have an adverse economic impact" on men, retroactively reducing their benefits by as much as 8%. 7a, 6a.

In so holding, the Court reiterated its earlier stated positions that: (1) the men had no "settled expectations," 8a, as to the exact amount of their monthly benefits and therefore it was not inequitable to reduce those benefits; (2) the "references in TIAA-CREF literature" (*e.g.*, annuity contracts) to the use of male-female mortality tables were "neither so clear" nor "highlighted" to such an extent that the men could have reasonably relied on them, 8-9a; and (3) the "visibility of the issue of the legality of using" sex-distinct tables made any continued reliance on their future use "unjustified," 9a, even for contributions made long prior to *Norris*.

REASONS FOR GRANTING THE WRIT

I. The Court of Appeals Has Misinterpreted This Court's Holding in *Norris* and Wrongfully Reinstated Retroactive Relief in Petitioners' Pension System

Norris squarely rejects retroactivity. In remanding *Spirt*, this Court instructed the Second Circuit to reconsider its decision which had granted retroactive relief. Notwithstanding *Norris*, the lower court has reinstated that relief. In so doing, the court failed to apply the fundamental teaching of *Norris* that retroactive relief will not be imposed where inequitable. The court's judgment, if not reversed, will devalue every pre-August 1, 1983 contribution made by hundreds of thousands of male participants in the TIAA-CREF system. While conceding that their decision would "unquestionably have an adverse economic impact" on men, 6a, the Second Circuit concluded that there was nothing in *Norris* to compel a contrary result. In these circumstances, we submit, this Court should exercise its jurisdiction, grant a writ of certiorari and "[bring] the case back once again to consider whether the lower court misapprehended the scope" of *Norris*' holding on relief. *Schlude* v. *Commissioner*, 372 U.S. 128, 130 (1963).

Petitioners believe that this Court established a rule of broad applicability in *Norris* meant to resolve in an unequivocal fashion all remaining disputes over retroactive relief in the pension and insurance industries. The rule is this: All post-August 1, 1983 contributions must purchase sex-neutral benefits; pre-August 1 contributions may be used to purchase sex-distinct benefits. That date was established, we submit, for compliance by "all em-

ployer-sponsored pension plans." 103 S. Ct. at 3510 (Powell, J.).[3] Justice O'Connor's statement of the Court's holding on relief, 103 S. Ct. at 3512-13, specifically joined in by Justice Powell, *id.* at 3510 n.12, addresses all employer-sponsored pension plans:

> I would require *employers* to ensure that benefits derived from contributions collected after the effective date of our judgment be calculated without regard to the sex of the employee. For contributions collected before the effective date of our judgment, however, I would allow *employers* and *participating insurers* to calculate the resulting benefits as they have in the past. (footnote omitted; emphasis supplied)

The Second Circuit, ignoring the breadth of the *Norris* holding, has engrafted a number of exceptions onto the clear and simple rule there announced. Thus, under the Second Circuit's interpretation of *Norris*, only employers or pension plans that would otherwise suffer added financial burdens could avoid retroactivity. 7a. Men, too, might escape a retroactive reduction in their benefits if they were sufficiently certain of how much they would otherwise receive. 5, 8a. And even those men who lacked a sufficiently certain understanding of their future retirement benefits might still avoid retroactivity if the resulting reduction in their benefits were "substantial." 8a.

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3 Indeed, it would appear that this Court could not have had Arizona's compliance with the *Norris* Judgment primarily in mind in establishing the August 1 deadline—Arizona had removed the deferred compensation plan provision at issue some years before. 103 S. Ct. at 3506 n.4 (Powell, J.).

These "guidelines" for the application of *Norris*' holding are inherently vague, subjective, and amenable to wide variations in application. Attempts to apply the Second Circuit's "rule" will spawn litigation in this arena rather than resolve it. Inconsistent rulings on relief could be anticipated among the cases now pending in a number of lower federal courts against TIAA-CREF and others.[4] This Court should exercise its jurisdiction in order to clarify the uncertainty created by the Second Circuit's misapplication of the clear, simple and equitable rule announced in *Norris*. *Furnco Construction Corp.* v. *Waters*, 438 U.S. 567, 569 (1978); *United States* v. *Gaddis*, 424 U.S. 544, 547 (1976).

Moreover, in arriving at its decision, the court below repeatedly expressed its own doubts as to the proper interpretation of *Norris*. *See, e.g.*, 7a ("Admittedly, the absence from the majority opinion of any mention of the dissent's preferred resolution of the case leaves us somewhat uncertain as to the meaning of the *Norris* decision."). Those doubts led to open speculation below as to

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4 The following pending cases involving TIAA and CREF contain unresolved issues as to the propriety of granting retroactive relief: *Peters, supra*; *EEOC* v. *Colby College*, No. 75-136 P (D. Me.); *Mich. State Univ. Faculty Ass'n* v. *Mich. State Univ.*, No. G76-640CA5 (W.D. Mich.); *Johnston* v. *Purdue Univ.*, No. L80-4 (N.D. Ind.); *EEOC* v. *Marquette Univ.*, No. 82-C-1578 (E.D. Wis.); *EEOC* v. *Columbia University*, No. 78 Civ. 4420 (S.D.N.Y.); *EEOC* v. *Lewis*, No. 81 Civ. 0881 (S.D.N.Y.); *Bailey* v. *Univ. of S. Calif.*, No. 75 Civ. 3862 (C.D. Cal.). Among cases not involving TIAA-CREF in which the question is raised are: *Hannahs* v. *New York State Teachers' Retirement System*, No. 78 Civ. 2541 (S.D.N.Y.); *Women in City Government United* v. *New York*, No. 75 Civ. 2868 (S.D.N.Y.); *Sobel* v. *Yeshiva Univ.*, No. 75 Civ. 2232 (S.D.N.Y.); *Retired Public Employees Ass'n of Calif., Chapter 22* v. *California*, No. C-77-2008 WHO (N.D. Cal.); *Long* v. *Florida*, No. TCA 82-1056-WS (N.D. Fla.).

the "plausibility" of various interpretations of the three *Norris* opinions, after which the court settled on the narrowest ground possible, limiting *Norris* to its precise facts.[5] Where the court below has admitted its uncertainty as to the scope of the decision of this Court, certiorari should be granted and the court's misunderstanding of the case corrected. *SEC* v. *United Benefit Life Insurance Co.*, 387 U.S. 202 (1967).

Contrary to the decision of the court below, *Norris* does prohibit the entry of retroactive relief against men in the TIAA-CREF system. The touchstone of *Norris*' teaching on relief is fairness and equity: The entry of retroactive relief there was found, in the words of Justice Powell, to be "both unprecedented and manifestly unjust." 103 S. Ct. at 3509. Justice O'Connor, joining the majority on relief, applied the three-part test enunciated in *Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 105-09 (1971), in finding retroactive relief to be wholly inappropriate, 103 S. Ct. at 3512: "In my view, [*Chevron's*] third criterion—whether retroactive application would impose inequitable results—compels a prospective decision in these circumstances."

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5 This Court in *Manhart* rejected an analogous approach urged there, stating (435 U.S. at 722 n.42):

> [W]e cannot base a ruling on the facts of this case alone. As this Court noted in *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, equitable remedies may be flexible but they still must be founded on principle. "Important national goals would be frustrated by a regime of discretion that 'produce[d] different results for breaches of duty in situations that cannot be differentiated in policy.' " *Id.* at 417.

The third *Chevron* criterion[6] is also manifestly met in the case of the men. If the Second Circuit's decision is allowed to stand, by the court's own calculation, 6a, some 40% of several hundred thousand men in the TIAA-CREF system will lose up to 8% of their accrued retirement benefits. JA720. The rules governing payment of annuity benefits will thus have been changed after the men's contributions have been made, and benefits, previously vested, will be lost.

The cost in lost benefits involved, if those contributions are unisexed, is staggering: Some $2 billion now destined to be paid to men would be shifted to women. *See* JA565. All this would occur without the men having been represented at any level of the proceedings below.[7] This proposed invasion of men's benefits is contrary to the contractual commitment, which existed at the time the

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6 The first two *Chevron* criteria are also satisfied here. That *Manhart* did not foreshadow a finding of liability for TIAA-CREF and the men in its system is, at a minimum, no less "sufficiently debatable," 103 S. Ct. at 3512 (O'Connor, J.), than was the case in *Norris*. Indeed, as late as October 1982, the Sixth Circuit in *Peters* found no Title VII liability whatever on the part of TIAA-CREF, because those insurers were not "employers" within the meaning of that statute. 154a. As respects the second criterion, imposition of retroactive relief here is not needed as a prod to compliance with the requirements of Title VII as defined in *Norris*: The employers in the TIAA-CREF system have been in compliance with *Norris* since August 1, 1983.

7 TIAA-CREF's motion to have men in its system joined as indispensable parties was denied by the district court. Although the issue was raised on appeal, it was not addressed by the Second Circuit.

contributions here at issue were made,[8] that an annuitant's age and sex would be taken into account in determining benefits. *See, e.g.*, JA497, § 7; JA505, § 7; JA532.

The Second Circuit justified its willingness to reduce the men's benefits because it found that the amount of these benefits was not precisely determinable prior to retirement. 5-6a. The conceded reduction in men's benefits is not made any the less unfair merely because the exact amount of the benefit they would otherwise receive is not known. Moreover, "certainty" in the amount of future annuity benefits provides no basis whatever to distinguish the plan at issue in *Norris* from the plan involved here, as assumed by the court below.[9]

Equity clearly must have a broader meaning in these circumstances than concern solely for the financial well-

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8 The Second Circuit's inability to perceive the equities of the men is shown by its willingness to devalue contributions made long before the claims advanced by the plaintiff here had any conceivable existence. Thus, that court has ruled that all such contributions must be subject to unisex tables, whether made before the *Manhart* decision, before the 1972 amendments to Title VII making the statute applicable to colleges and universities, or even before passage of the 1964 Civil Rights Act itself. The court's award also thereby violates the "good faith reliance" provisions of Title VII, 42 U.S.C. § 2000e-12(b) (1982) and the Portal-to-Portal Act, 29 U.S.C. § 259 (1982), and the Title VII limitation on awards of back pay, 42 U.S.C. § 2000e-5(g) (1982).

9 The Second Circuit's conclusion that there is a "fundamental difference," 5a, between those two plans as respects "certainty" is plainly wrong. The lifetime benefit levels provided in both plans are dependent upon (a) the amount contributed per year, (b) the number of years one contributes, (c) earnings on amounts contributed, and (d) the annuity payment option selected. *Compare, e.g.*, the Stipulated Statement of Facts contained in the Joint Appendix filed with this Court by the parties in *Norris*, at 12, with TIAA-CREF's annual Report of Annuity Premiums and Benefits, JA380-83.

being of pension plans and employers. Individual male annuitants are also entitled to be treated fairly. If the relief granted below is allowed to stand, it would work an inequity on the men more severe than that present in *Norris*. In these circumstances, this Court should grant certiorari and reverse the Second Circuit's misapprehension of *Norris*' holding on relief. *Henry* v. *City of Rock Hill*, 376 U.S. 776 (1964).

II. A Conflict Exists Between the Circuits As to Whether the Independent Insurers TIAA-CREF Are "Employers" of Their Annuitants within the Meaning of Title VII.

In its September 29, 1982 opinion the Second Circuit held that TIAA-CREF must be "deemed" to be an "employer" of the persons they insure (1) by reason of its relationship to the colleges and universities it serves and (2) in order not to frustrate the effectiveness of Title VII. 24-25a. This holding was a necessary predicate to the entry of retroactive relief against TIAA-CREF and the men in its system.

In contrast, the Sixth Circuit's October 14, 1982 decision in *Peters* found the holding of the lower court that TIAA-CREF are employers within the meaning of Title VII to be "clearly erroneous". 154a. Citing *Manhart*, 435 U.S. at 717, the court rejected the suggestion that Wayne State University had delegated responsibility for any aspect of employee compensation to TIAA-CREF or, absent any evidence of control, that TIAA-CREF was the "agent" of Wayne State University. 154a. The Court should exercise its jurisdiction and resolve this conflict, declaring TIAA-CREF not to be employers of their annuitants. *Mueller* v. *Allen*, 103 S. Ct. 3062, 3064 (1983); *Union Labor Life Insurance Co.* v. *Pireno*, 458 U.S. 119 (1982); *Corning Glass Works* v. *Brennan*, 417 U.S. 188, 190-91 (1974).

The argument that TIAA-CREF is an "employer" is at odds with the express language of Title VII and common sense. TIAA-CREF do not employ their annuitants—the colleges and universities do. Rather, TIAA and CREF, independent insurers with hundreds of thousands of annuitants at colleges and universities throughout the nation, clearly represent "the insurance and pension industries" recognized in *Manhart* as entitled to different treatment under Title VII than that received by the employer-operated plan at issue there. 435 U.S. at 717. Likewise, the college and university employers in no way control the risk classification and ratemaking activities of TIAA-CREF. In specifying that its retirement plan would be funded through TIAA and CREF contracts, the employer here, LIU, did not create an agency relationship between itself and TIAA-CREF, nor did it make a sham delegation of its pension responsibilities to "corporate shells." *Manhart*, 435 U.S. at 718 n.33.

In ignoring these distinctions the Second Circuit has improperly expanded the scope of Title VII and disregarded *Manhart*'s clear statement that "Title VII and the Equal Pay Act primarily govern relations between employees and their employer, not between employees and third parties." *Id.*[10] The conclusions of the two circuits remain in direct conflict on this issue, the resolution of which is fundamental to the applicability of Title VII to petitioners here and to all other insurers. This Court, we submit, should exercise its jurisdiction and resolve this divergence between the circuits concerning the scope of this important federal statute.

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10 Justice Marshall for the majority on liability in *Norris* quoted the above language from *Manhart*, describing it as a "limitation on the reach of [Title VII]." 103 S. Ct. at 3499.

III. The Second Circuit's Curtailment of the McCarran-Ferguson Act Should Be Reviewed and Corrected by This Court

The court below held that despite the breadth apparent from the words of the McCarran-Ferguson Act, the statute was essentially limited to resolving federal-state regulatory conflicts arising out of the antitrust laws. 28a. In holding that the Act does not prohibit federal regulation of New York insurance companies under post-McCarran civil rights laws such as Title VII, the court has disregarded the policy of the Act, its plain language, and its legislative history. The decision curtails an important federal statute designed to promote state regulation of the insurance industry[11] and protect state interests against unexpressed federal preemption of that important role. A substantial federal question has thus been raised requiring this Court's review.

The Second Circuit's decision has destroyed the certainty that existed within the industry as to the federal-state relationship in the regulation of the business of insurance. The Second Circuit has thus substituted confusion for clarity by entirely exempting from the Act's scope an ill-defined body of federal regulation. The words "No Act of Congress" in the Act have become "Some Acts of Congress," with an enormous potential impact on the insurance industry and state regulation of insurance. Unexpressed and unintended federal regula-

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11 The interference with New York insurance regulation is clear. The finding by the district court that New York has regulated insurance "in a pervasive manner," and that "within that comprehensive system of regulation discrimination on the basis of sex in computing rates and benefits is considered to be permissible," 64a, stands unchallenged by the Second Circuit decision.

tion can, if this decision stands, now control the insurance industry, although beyond any doubt this would be the exact antithesis of what the Congress intended. We urge the Court to grant review in order to restore McCarran's intended application.

The error in this restrictive application of the Act is obvious in light of its evolution. As Justice Powell pointed out in *Norris*, 103 S. Ct. at 3506-07 n.5: "As initially proposed, the Act had a narrow focus" limited to the Sherman and Clayton Acts. "This narrow version, however, was not accepted," and Congress "adopted a much broader bill" because it recognized that it must remove any questions "as to the general validity of state laws governing the business of insurance." *Id.* Accordingly, the Act "commits the regulation of the insurance industry presumptively to the States." *Id.* Yet the Second Circuit has applied Title VII to the "business of insurance," even though that statute contains no language showing that it "specifically relates" to that "business." In doing so, it has authorized federal interference in a matter left by Congress to State regulation.

Further, the limitation of the statute to the antitrust laws is in conflict with the decision of another circuit court. In *Cochran* v. *Paco, Inc.*, 606 F.2d 460, 463 (5th Cir. 1979), in considering the relationship between the McCarran Act and the Truth-in-Lending Act, the court stated:

> Finally, although the Act was passed primarily in response to *South-Eastern Underwriters*, an antitrust case, there is no doubt that its scope is much broader than the antitrust area. . . . In addition, these two sections [15 U.S.C. §§ 1011 and 1012] speak of

"regulation" of the insurance business, and that term is certainly not limited to antitrust regulation.

An example of the state-federal conflict which McCarran was meant to avoid is present here. The plaintiff and the EEOC sued the New York Superintendent of Insurance because of his disapproval, as inconsistent with New York law, of a merged-gender mortality table proposed for prospective use by TIAA-CREF in 1981. The EEOC seeks to substitute its own views of the proper regulation of these insurers for that of the New York State official specifically charged with that task. The interest of the states in the proper regulation of insurance, the expressed rationale for the Act, *see* 15 U.S.C. § 1011 (1982) (161a), is thus threatened.

The lower court further held, exclusively on the basis of *SEC* v. *Variable Annuity Life Insurance Co.*, 359 U.S. 65 (1959), that CREF was not engaged in the "business of insurance" because its contracts did not subject it to "investment risk." 16-17a. This result was endorsed despite the fact that TIAA (whose annuities carry a guaranteed return and thus subject it to investment risk) and CREF share common management, engage in the same risk classification and risk spreading activities, and are both closely regulated by the Insurance Department of the State of New York.

The risk classification and risk spreading activities of CREF, moreover, clearly qualify it as being engaged in the "business of insurance" in light of this Court's later

decisions in *Group Life & Health Insurance Co.* v. *Royal Drug Co.*, 440 U.S. 205, 213 (1979), and *Union Labor Life Insurance Co.* v. *Pireno*, 458 U.S. 119, 129 (1982). The interest of the states in the regulation of the business of insurance unfettered by unintended federal intervention[12] would here be best served by application of the Act to CREF as well as TIAA.

The Second Circuit has clearly erred in redrawing the McCarran-Ferguson Act in a manner which not only destroys its purpose but can only result in the erosion of the existing federal-state balance in the regulation of the insurance industry. We believe there is a strong federal interest in resolving the conflict between the circuits and in restoring the obvious meaning intended by Congress in the McCarran Act.

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12 Former New York Superintendent of Insurance Lewis has termed the prospect that CREF would not be subject to the Act, but rather under the supervision of federal agencies with no insurance expertise, such as the EEOC, an "intolerable" intrusion into that Department's ability to regulate insurers. JA635. The same reasoning would, of course, apply to TIAA as well.

CONCLUSION

For all the foregoing reasons, we urge that a writ of certiorari issue to review the May 21, 1984 and September 29, 1982 decisions of the Second Circuit.

Respectfully submitted,

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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

TEACHERS INSURANCE AND ANNUITY ASSOCIATION and COLLEGE RETIREMENT EQUITIES FUND,

Petitioners,

—v.—

DIANA L. SPIRT, *et al.*,

Respondents.

APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Opinion of the Court of Appeals dated May 21, 1984

DIANA L. SPIRT,

Plaintiff-Appellant-Cross-Appellee,

—and—

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, and AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS,

Plaintiffs-Intervenors-Appellees,

—v.—

TEACHERS INSURANCE AND ANNUITY ASSOCIATION, COLLEGE RETIREMENT EQUITIES FUND, LONG ISLAND UNIVERSITY, and ALBERT B. LEWIS,

Defendants-Appellees-Cross-Appellants.

Nos. 79-7715, 79-7737, 79-7739

United States Court of Appeals,
Second Circuit

Submitted October 11, 1983
Decided May 21, 1984

Before:

NEWMAN and PRATT,* *Circuit Judges,*
and CANNELLA, *District Judge.***

On remand from the Supreme Court for further consideration in light of *Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans v. Norris*, 103 S. Ct. 3492 (1983).

Judgment of the District Court affirmed as modified.

JON O. NEWMAN, *Circuit Judge*:

This appeal, involving the validity of gender-based mortality tables in calculating teachers' pension benefits, is before the Court upon remand from the Supreme Court "for further consideration in light of *Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans v. Norris*, 463 U.S. ____. 103 S. Ct. 3492, 76 L. Ed. 2d ____ (1983)." *Long Island University v. Spirt*, 103 S. Ct. 3566 (1983). Our prior decision, 691 F.2d 1054 2d. Cir. 1982), determined issues concerning both liability and relief. With respect to liability, we held that defendants College Retirement Equities Fund ("CREF") and Teachers Insurance and Annuity Association ("TIAA") (collectively "TIAA-CREF") must be deemed to be "employers" for purposes of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, that use of

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* Judge Pierce, who wrote the prior opinion in this case, 691, F.2d 1054, recused himself for reasons arising after the prior decision.

** The Honorable John M. Cannella of the United States District Court for the Southern District of New York, sitting by designation.

gender-distinct mortality tables by TIAA-CREF to compute annuity benefits violates Title VII, and that Title VII is not rendered inapplicable to TIAA-CREF by the McCarran-Ferguson Act, 15 U.S.C. § 10011 *et seq*. With respect to relief, our decision affirmed (a) the provision of the District Court's judgment that enjoined Long Island University after June 1, 1980, from contributing, or requiring its employees to contribute, to any retirement plan that uses gender-distinct mortality tables and (b) the provision enjoining CREF from using such tables to calculate annuity benefits for persons retiring after May 1, 1980; we also directed that the latter provision should also apply to TIAA.

Upon the reconsideration directed by the Supreme Court, the plaintiff and intervenors Equal Employment Opportunity Commission ("EEOC") and the American Association of University Professors ("AAUP") urge that we reinstate all of the operative terms of our September 29, 1982, decision. TIAA-CREF, noting that "there does not appear to be any reconsideration of liability issues required by *Norris*," Brief of TIAA-CREF upon reconsideration, at 4 n.*, urge us to modify our decision with respect to one significant aspect of relief. They read *Norris* to require abandonment of gender-distinct mortality tables only with respect to that portion of annuity benefits derived from contributions made after August 1, 1983, the date of issuance of the Supreme Court's decision in *Norris*, 103 S. Ct. at 3494. They contend that, since they have made changes necessary to use unisex mortality tables with respect to annuity benefits derived from post-August 1, 1983, contributions, no further relief is warranted, and the case should be dismissed as moot.

The issue before us thus presents what has come to be called the question of "retroactivity," a term of somewhat ambiguous meaning in the context of determining appropriate relief in Title VII annuity cases. There is no claim in this case for "retroactivity" in its fullest sense: No one asserts that TIAA-CREF should be required to make any additional payments to any person who retired prior to the date of the District Court's decision, rendered September 17, 1979. 475 F. Supp. 1298. The

District Court, explicitly mindful of the Supreme Court's cautions about retroactive remedies expressed in *City of Los Angeles v. Manhart*, 435 U.S. 702, 718-23 (1978), 475 F. Supp. at 1316, provided that its remedy should apply only in the future; Judge Ward directed that the prohibition on use of gender-distinct mortality tables apply to the calculation of benefits only of those retiring after his judgment, and he stayed the effective date until May 1, 1980, to afford time to prepare for compliance with his decree. Nevertheless, his remedy is retroactive in a limited sense: It affects that portion of benefits attributable to contributions that were made prior to the effective date of the District Court's judgment. Whether retroactivity in that limited sense is permissible in this case, in light of the *Norris* decision, is the precise issue before us.

In *Norris* the Supreme Court made clear that it considers a judgment in a Title VII pension benefit case to have retroactive effect when that judgment, though applicable only to persons retiring after its date, affects a portion of benefits attributable to contributions made prior to its date. 103 S. Ct. 3503 (Marshall, J., concurring in the judgment in part); *id.* at 3509-10 n.10 (Powell, J., concurring in part). It is far less clear, however, whether the Court proscribed retroactivity in that sense in the circumstances presented by the TIAA-CREF plans at issue in this case. The relief provisions invalidated in *Norris* would have obligated the employer, the State of Arizona, to provide additional money to bring the benefits to be paid to female retirees up to the level of benefits to be paid to similarly situated male retirees. Writing for the Court majority on the issue of relief, Justice Powell explicitly assumed that the retroactivity aspect of the judgment being reviewed would require employers "to top up women's benefits." 103 S. Ct. at 3510 n.11. Justice Powell noted the heavy financial cost of this "topping up" and observed that in *Norris* the cost would fall on the State of Arizona. *Id* at 3510. What made retroactivity inequitable in *Norris*, contrary to the normal preference to eliminate the effects of past discrimination, *see Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418-22 (1975), was the

imposition of heavy financial burdens on employers, especially public employers, in view of the fact that until *Norris*, the Court had not explicitly invalidated an employer's use of gender-distinct mortality tables. Justice Powell expressed concern not only for the employers, who would be primarily obligated to increase the women's benefits, but also for the pension plans themselves, which, in the absence of extra employer contributions, would risk insolvency by shouldering the cost of "topping up." Justice O'Connor expressed the same concerns: "A retroactive holding by this Court that employers must disburse greater annuity benefits than the collected contributions can support would jeopardize the entire pension fund . . . . This real danger of bankrupting pension funds requires that our decision be made prospective." 103 S. Ct. at 3512 (O'Connor, J., concurring).

The premise of the *Norris* ruling against retroactivity—that equalization of women's benefits requires the employer or the plan to pay out extra sums of money—is inapplicable to the case before us. This is so because of the fundamental difference between the plan in *Norris* and the TIAA-CREF arrangements. In *Norris* the Arizona Deferred Compensation Plan provided sufficient certainty concerning the amount of annuity payments to enable the District Court to calculate, long before the plaintiff's retirement, the amount of her monthly annuity. 486 F. Supp. 645, 648. It was this expectation of a determinable benefit that the Supreme Court majority in *Norris* did not wish to have jeopardized by imposing added financial burdens on the plan. As Justice O'Connor observed, "Many working men and women have based their retirement decisions on expectations of a certain stream of income during retirement. These decisions depend on the existence of adequate reserves to fund these pensions." 103 S. Ct. at 3512 (O'Connor, J., concurring). By contrast, the TIAA-CREF plans do not guarantee retirees "a certain stream of income." As we previously noted, CREF "guarantees plan participants no specified amount of monthly payments. The TIAA-CREF publication which explains the CREF system states that: 'The

CREF annuity pays you a retirement income that varies year by year, reflecting primarily the experience of the securities in CREF's portfolio." ' 691 F.2d at 1068-69. Similarly, the TIAA benefit, based on investment results, is not ascertainable. *Id.* at 1068. Thus, with one possible exception to be noted below, the limited form of retroactive relief in the District Court's judgment need not be rejected because of any fear that either the employer or TIAA-CREF will be burdened with any additional financial obligations.

However, noting the absence of new burdens upon the employer or the plan does not automatically mean that we may reinstate our prior decision. The retroactive aspect of the District Court's judgment will unquestionably have an adverse economic impact. The elimination of gender-distinct mortality tables and the consequent equalization of benefits for similarly situated men and women will mean that male retirees, as a class, will receive less dollars than whatever amounts they would have received if gender-distinct tables continued to be used to determine the portion of benefits derived from pre-judgment contributions. The significance of this reduction depends on whether it is considered in the aggregate or individually. The American Council of Life Insurance and the Health Insurance Association of America, *amici curiae*, point to an aggregate sum of $2 billion that will be effectively transferred from male to female annuitants by the use of unisex tables. Brief for *Amici Curiae* at 14. On the other hand, our prior opinion noted that for 60% of the men the use of unisex tables will have no consequence because they elect a joint-survivor option that continues benefits for the lifetime of their surviving wives and that for the remaining 40% of the men use of unisex tables will mean a reduction of between 1% and 8% of whatever benefits they would otherwise receive. 691 F.2d at 1069 n.12. TIAA-CREF contends that *Norris* proscribes retroactivity in this case because of the adverse consequence to some of the male annuitants. The plaintiff, the EEOC, and the intervenor AAUP (representing thousands of male and female members) disagree, arguing that reduction in benefits to males

is not inequitable in the absence of any settled expectation of the males concerning the level of their future benefits.

After careful consideration of the majority opinion in *Norris* on the issue of relief, we conclude that the Court did not intend to bar retroactivity in the circumstances of this case. The entire thrust of Justice Powell's opinion focuses on the burdens that retroactivity would impose upon the employer or the plan. The prospect of adverse consequences to male annuitants is not mentioned, presumably because the majority was satisfied that the District Court's judgment in that case would not result in reduction of benefits to any male; equalization was to be achieved solely by "topping up" the benefits to females. The absence from the majority opinion on relief of any discussion of benefit levels of male annuitants is especially striking in view of the explicit consideration of this matter by the Justices who joined that portion of Justice Marshall's opinion dissenting on the issue of relief. 103 S. Ct. at 3502-04. Justice Marshall, for the four-member dissent, expressed the view that the availability of retroactive relief should turn on whether unisex tables could be applied to that portion of benefits attributable to contributions made prior to the *Manhart* decision "without violating the male employee's contractual rights." *Id.* at 3504. He would have remanded for determination of whether male participants "had any contractual right to a particular level of benefits that would have been impaired by the application of sex-neutral tables to their pre-*Manhart* contributions." *Id.*

Admittedly, the absence from the majority opinion of any mention of the dissent's preferred resolution of the case leaves us somewhat uncertain as to the meaning of the *Norris* decision. It is possible that the majority considered the dissent to be in error in thinking that the record was uncertain as to whether male annuitants had contractual rights to specified benefit levels. Perhaps the majority thought it absolutely clear that the male annuitants had such rights. That seems to be the more plausible interpretation; otherwise, it is difficult to understand why the opinion of Justice Powell explicitly assumed

that "topping up" was a necessary consequence of the District Court's judgment. On the other hand, it is also possible that the majority considered the dissent to be irrelevant, that the majority intended to bar any form of retroactivity whether or not contractual rights of the male annuitants would be defeated by use of unisex tables. That seems to be the less plausible interpretation; it is difficult to imagine why Justice Powell's opinion was so emphatic in cautioning against the imposition of financial burdens on employers and plans if in *Norris* it was contractually possible to make retroactive use of unisex tables and thereby equalize benefits without imposing any financial burdens on the employer or the plan.

If, as TIAA-CREF contends, the *Norris* majority intended to bar retroactivity in all annuity cases simply because equalization of benefits must inevitably burden someone, we would have expected to see some intimation of that view in Justice Powell's opinion. Instead, we see only a prohibition of relief provisions that impose added financial burdens on employers or plans. If the Supreme Court were confronted with a relief provision that reduced the benefits of male annuitants from specified benefit levels (or levels readily calculable, for example, from an annuitant's recent salary), it might well consider such provisions inequitable. And inequity might also arise if a group were so female dominated that retroactive use of unisex tables would cause a substantial reduction even of unspecified benefit levels of males. But we see nothing in *Norris* that proscribes retroactive provisions simply because unspecified benefit levels for some male annuitants will be slightly lower than whatever they would have been under gender-distinct tables.

In our prior decision we explicitly considered whether the retroactive aspect of the District Court's judgment would be inequitable to those male annuitants who would receive lower benefits. We agreed with the District Court that it would not because "no employees could have had settled expectations as to the amount of monthly benefits" and the references in TIAA-CREF literature to the impact of gender upon benefit

levels "are neither so clear, nor are they highlighted in such a way, that it is plausible to think that male plan participants relied upon them in any meaningful way." 691 F.2d at 1069. We also noted that any reliance on gender-distinct tables was "unjusitfied in light of the visibility of the issue of the legality of using such tables, at least since it was brought to the attention of all participants in 1973." *Id.* This assessment of the equities remains unaltered by the decision in *Norris*.

In one minor respect, however, we think it would be prudent to modify our prior decision. Though the benefit level for TIAA participants depends primarily on the investment success of the TIAA portfolio, TIAA guarantees that benefit levels will reflect at least a 2-1/2% return on investments. In our prior decision, we noted that this minimum guarantee was so low "that there is no danger that the male participants' expectation that they will receive the minimal guaranteed benefit will be jeopardized by the relatively minor changes . . . necessitated by the relief ordered." 691 F.2d at 1068. We still consider the likelihood that TIAA will fail to earn 2-1/2% on its investment to be an insignificant risk. However, since *Norris* appears to foreclose any possibility of the retroactive imposition of added financial burdens upon employers or plans, we will direct the District Court to modify its judgment to provide that unisex tables need not be used in calculating the portion of benefits attributable to pre-judgment contributions to whatever extent may be necessary in any year to ensure that the use of such tables will not impose added financial burdens upon the employer or TIAA beyond those resulting from the obligation to pay benefits reflecting a 2-1/2% return on investment. We leave it to the parties to suggest to the District Court appropriate language for precluding this unlikely eventuality.

The judgment of this Court rendered September 29, 1982, is reinstated, subject only to the modification set forth in the preceding paragraph. As thus modified, the judgment of the District Court is affirmed.

Opinion of the Court of Appeals dated September 29, 1982

DIANA SPIRT,

Plaintiff-Appellant-Cross-Appellee,

—and—

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, and AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS,

Intervenors-Appellees,

—v.—

TEACHERS INSURANCE AND ANNUITY ASSOCIATION, COLLEGE RETIREMENT EQUITIES FUND, LONG ISLAND UNIVERSITY, and ALBERT B. LEWIS,

Defendants-Cross-Appellants-Appellees.

Nos. 79-7715, 79-7737, 79-7739

United States Court of Appeals,
Second Circuit

Argued June 18, 1982
Decided September 29, 1982

Before:

NEWMAN and PIERCE, *Circuit Judges,*
and CANNELLA, *Senior District Judge.**

* The Honorable John M. Cannella, Senior United States District Judge for the Southern District of New York, sitting by designation.

Appeal from a judgment of the United States District Court for the Southern District of New York, Robert J. Ward, *J.*, granting and denying motions and cross-motions for summary judgment and to dismiss. The court below found that defendants Teachers Insurance And Annuity Association ("TIAA") and College Retirement Equities Fund ("CREF") violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, by calculating retirement benefits based on sex-distinct mortality tables, and granted judgment against CREF, while finding that TIAA was exempt from the mandate of Title VII by virtue of the McCarran-Ferguson Act, 15 U.S.C. § 1011 *et seq.*

Affirmed in part; reversed in part, and remanded.

PIERCE, *Circuit Judge*:

It is plaintiff's claim, in this action which was filed in the United States District Court for the Southern District of New York more than eight years ago, that defendants Teachers Insurance and Annuity Association ("TIAA") and College Retirement Equities Fund ("CREF") have violated the equal employment provisions of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* ("Title VII"), by using sex-based mortality tables to calculate the benefits to which pension plan participants, including plaintiff, are entitled upon retirement. As a result of the use of such tables female retirees, who made contributions equal to those of similarly-situated males, receive a smaller monthly retirement benefit than do such male retirees. The district judge found that defendants' use of sex-based mortality tables violated Title VII, and granted summary judgment on this issue. He went on to hold, however, that TIAA—but not CREF—was exempted from compliance with Title VII by virtue of the McCarran-Ferguson Act, 15 U.S.C. § 1011 *et seq.* Therefore, the district court enjoined CREF—but not TIAA—from using sex-based mortality tables to calculate the number of annuity units to which a retiree is entitled upon retirement on or after May 1, 1980, and enjoined Long Island University ("LIU"), plaintiff's employer, from either making contributions on behalf of its employees, or requiring

its employees to contribute, to any retirement plan continuing to use sex-based mortality tables to calculate periodic benefits after June 1, 1980.

Plaintiff also claimed below that TIAA and CREF's methods of calculating retirement benefits violated the equal pay provisions of the Fair Labor Standards Act of 1964, 29 U.S.C. § 206(d), and infringed her right to equal protection of the laws in violation of 42 U.S.C. §§ 1983 and 1985. Finding no state action, the district judge granted defendants TIAA-CREF's motion for summary judgment on the §§ 1983 and 1985 claims. Plaintiff's equal pay claims apparently were not the subject of motions for summary judgment below, and were not dealt with by the district court.

Defendants TIAA-CREF and plaintiff have appealed virtually every final order of the district court pursuant to 28 U.S.C. § 1291.

We affirm in part and reverse in part.

I. *Facts*

Plaintiff Diana L. Spirt is a tenured professor at Long Island University. LIU has adopted a retirement program managed by TIAA and CREF for its tenured professors and certain other employees. Participation in this program is mandatory for most eligible employees, including plaintiff.

TIAA and CREF manage retirement plans for faculty and staff members at 85% of all private four-year colleges and universities and over 40% of all public colleges and universities in the United States. More than 400,000 employees at approximately 2800 colleges and universities participate in the TIAA-CREF system. TIAA is a non-profit, legal reserve life insurance company which was organized in 1918 by the Carnegie Foundation for the Advancement of Teaching. It is " 'an educational service organization [providing] insurance annuities especially designed for employees of educational institutions in the United States and Canada.' " *Peters v. Wayne State University,* 476 F. Supp. 1343, 1346 (E.D. Mich. 1979).

In 1952, TIAA's companion organization, CREF, was created in order to allow the investment of pension funds in

financial instruments other than those traditionally permissible for annuity funds like TIAA. It, like TIAA, is a non-profit corporation, created by special act of the New York State Legislature.

Under the LIU retirement plan the employee and the university each contributes 5% of the first $4800 of an employee's yearly earnings to the pension fund. In addition, LIU contributes 11% of all earnings in excess of $4800, while the employee contributes 5% of all such earnings. Employees may also make voluntary additional payments into their pension fund accounts, on either a regular or an occasional basis. After receipt by TIAA-CREF, all contributions, plus minimum interest and dividends thereon, are immediately credited to individual employees' accounts as they accumulate. Pursuant to contract, all accumulated benefits are fully vested and fully "portable" at all times. Thus each employee has an immediate property interest in the benefits that accrue by virtue of the contributions made on the employee's behalf. In addition, each employee retains this ownership right if and when that employee moves on to other employment, either inside or outside the field of higher education. If a plan participant moves to another university that has adopted a TIAA-CREF retirement program for its employees, the new employer will pay its own pension contributions and those which it withholds from the employee's salary into the employee's existing account. If a plan participant obtains employment in a different field or at a teaching institution that does not use TIAA-CREF to provide its retirement program, that participant can nevertheless make additional contributions to the TIAA-CREF account on either a regular or occasional basis. Even if the employee fails to make such contributions, the participant will retain the right to receive, upon retirement, the benefits to which the participant is entitled by virtue of the contributions that were accumulated on his or her behalf. If a plan participant dies before retirement, the funds accumulated in the account are paid to a designated beneficiary as a death benefit.

After retirement, TIAA provides a life-long fixed dollar annuity, which pays the retired plan participant a specified and

definite amount of benefit on a monthly basis.[1] CREF, on the other hand, provides its annuitants with a variable annuity. Under this plan the annuitant receives a periodic payment, the amount of which reflects the results of CREF's investment policies. Plan participants may allocate their contributions between TIAA and CREF in whatever proportions they choose, and under certain conditions, they may transfer contributions from one system to the other. Upon an employee's retirement, both the amount of the fixed benefit to be received monthly from TIAA and the amount of CREF units to be used in determining the amount of benefits to which an employee will be entitled each year under the CREF variable-annuity program are calculated, and the retiree's contract with TIAA-CREF is "settled."[2] This calculation of benefits is based in large part on life expectancy projections, which are determined, in turn, by use of sex-segregated mortality tables. Because women as a class live longer than men as a class, and women as a group are expected, as a result, to receive annuity payments over a longer period of time than similarly-situated men, the use of tables which reflect this male-female difference results in female retirees, who have made pension contributions that are equal to those made by similarly-situated men, receiving monthly payments that are smaller than those re-

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1 Although it is assumed that most TIAA-CREF participants will receive their retirement benefits on a monthly basis, an annuitant may choose to receive annuity payments quarterly, semi-annually, or annually, rather than monthly. JA 196. Also, rather than simply receiving benefit payments for the duration of one's own life (a single life annuity), a retiree can opt for a life annuity with a ten or twenty year guaranteed period, or for a joint-life option, under which benefits will continue throughout the lives of both the retiree and a named beneficiary. JA 383.

2 Under the TIAA-CREF system a retiree has no right to receive a lump sum payment for the full value of contributions paid into the fund. However, upon retirement a participant may choose to receive up to 10% of accumulated contributions for use in dealing with transitional costs. Receipt of such a payment results, of course, in a corresponding decrease in the amount of moneys available for annuity payments.

ceived by their male counterparts.[3] It is stipulated among the parties that "[c]ommencing at age 65, the amount of each periodic payment to male annuitants under the single life option is approximately 11.3% greater than the amount payable to female annuitants of the same age." JA 182. It is this result that is challenged as violative of Title VII.

II. *Procedural History*

Plaintiff initiated this action against TIAA and CREF by filing her complaint on April 15, 1974. On May 29, 1975, she moved for class certification and partial summary judgment. On August 20, 1975, defendants TIAA and CREF cross-moved for summary judgment and to dismiss the complaint pursuant to Rule 19, Fed.R.Civ.P., for failure to join the individual male annuitants in the TIAA-CREF system as indispensable parties to the litigation. On January 23, 1976, the motions for summary judgment were denied on the ground that there existed disputed issues of material fact. At that time decision on the other motions was postponed. On May 5, 1976, TIAA-CREF again moved for partial summary judgment on the ground that plaintiff had failed to properly file with the Equal Employment Opportunity Commission ("EEOC") and the New York State Division of Human Rights the complaints that are jurisdictional prerequisites to suit in the federal district court under Title VII.[4] In addition, defendants moved to dismiss for failure to join plaintiff's employer, LIU, as an indispensable party. In an opinion dated July 1, 1976, the district judge denied defendants' motion for partial summary judgment, denied

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3 "Similarly-situated" individuals are those who are the same age, retire on the same date, and have identical amounts of accumulated contributions in their individual retirement accounts on the date of retirement.

4 We agree with the district judge that neither plaintiff's failure to file a complaint with the EEOC prior to initiating her suit in the district court, nor her alleged failure to pursue her state remedies, served to defeat the jurisdiction of the district court over this action. *See Egelston v. State Univ. College at Geneseo,* 535 F.2d 752, 754-55 (2d Cir. 1976).

plaintiff's motion for class certification, and denied defendants' Rule 19 motions except to the extent that plaintiff was directed to file an amended complaint joining LIU as a defendant in the action. After filing an amended complaint, plaintiff moved once again for summary judgment. Defendants TIAA and CREF again cross-moved for summary judgment. In their motions both parties relied heavily on a Stipulation of Facts dated April 21, 1977. On August 9, 1979, Judge Ward filed an opinion in which he found that TIAA-CREF's use of sex-based mortality tables violated Title VII of the Civil Rights Act of 1964. Therefore, the district judge granted summary judgment in plaintiff's favor against CREF and enjoined CREF from using sex-based mortality tables in calculating benefits to which retirees would become entitled upon retirement on and after May 1, 1980. However, because the district judge also found that TIAA was in the business of insurance, he granted summary judgment in favor of TIAA on the ground that it was exempted from the provisions of Title VII by the McCarran-Ferguson Act, 15 U.S.C. § 1011 *et seq.*

Although the district judge entered no order directly against TIAA, he did enter an order enjoining LIU from making any contributions, and from requiring its employees to contribute, to any retirement plan that continued to use sex-distinct mortality tables in calculating the periodic benefits to be received by persons retiring on or after June 1, 1980.[5] CREF moved for reargument, contending that the relief granted was improperly retroactive since it would alter the value of benefits that men

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5 This order obviously meant that LIU could no longer deal with TIAA unless TIAA "voluntarily" began to use gender-neutral mortality tables to calculate the benefits to be received by a retiring plan participant. It was also always clear that TIAA and CREF are so closely intertwined that, as a practical matter, TIAA would have to make changes in its method of calculating accrued benefits in order to synchronize with any changes made by CREF. Indeed, at a hearing after remand, Judge Ward stated, "I have always visualized TIAA and CREF somewhat like twins and I sort of separated the Siamese twins but I recognize that though I may have separated them in one way from a practical and business point of view they must follow the same course." JA 683.

would receive as a result of contributions made to CREF prior to the date of the district court's decision. This motion was denied on September 12, 1979. In October, 1979, defendants TIAA, CREF, and LIU, and plaintiff Spirt all filed Notices of Appeal from the judgment of the district court. However, these appeals were withdrawn from the active consideration of this Court on January 8, 1980, so that the district judge could supervise the settlement negotiations then proceeding between the parties. During this period, TIAA and CREF made several attempts to design and obtain approval for merged-gender, or "unisex" mortality tables for the calculation of annuity benefits attributable to contributions made after the proposal's adoption.[6] The first of these plans ("Unisex I") was disapproved by the EEOC. After modification, the plan ("Unisex II") was resubmitted and was approved by the EEOC, but was then disapproved by the New York State Superintendent of Insurance, Albert Lewis, in January and February, 1981.[7]

By February 19, 1981, settlement negotiations had collapsed, and this Court granted a limited remand of the case to allow consideration of TIAA-CREF's "good faith reliance" defense against the imposition of what they, and, apparently, Superintendent Lewis, considered to be retroactive relief, and to permit the plaintiff to join Superintendent Lewis as a party. Plaintiff then filed a supplemental complaint and a motion for summary judgment. TIAA-CREF cross-moved to dismiss the supplemental complaint for failure to state a claim upon which

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6 Apparently no attempt was ever made to design unisex tables for use in calculating benefits based on contributions accumulated prior to the date of the district court's order, although such tables would have been required if the parties were to comply fully with that order.

7 The disapproval of "Unisex II" was based on the Superintendent's view that the change would unfairly deprive male participants of the full value of contributions made while TIAA-CREF was using sex-based mortality tables. JA 621. Superintendent Lewis did approve a later merged-gender proposal ("Unisex III"), but Unisex III was disapproved by the EEOC, which viewed it as violative of Title VII and the Equal Pay Act.

relief could be granted. In an opinion dated March 19, 1982, the district judge rejected TIAA-CREF's good faith reliance defense, denied plaintiff's motion for summary judgment against Superintendent Lewis, granted defendants' cross-motion to dismiss the supplemental complaint, and granted motions by the EEOC and the American Association of University Professors ("AAUP") to intervene with regard to the issue of "good faith reliance." On March 29, 1982, the district court granted a stay pending appeal of its orders. TIAA-CREF and plaintiff filed Amended Notices of Appeal on April 7, and April 12, 1982, respectively. Virtually all of the issues decided by the district judge are now before us on appeal.

III. *Title VII Violation*

Title VII of the Civil Rights Act of 1964 was enacted in order to deal with the essential unfairness of employment discrimination. Members of Congress saw its provisions as a necessary element of the comprehensive anti-discrimination legislation of which it was a part because "[t]he rights of citizenship mean little if an individual is unable to gain the economic wherewithal to enjoy or properly utilize them." H.R. Rep. No. 914, 88th Cong., 2d Sess., *reprinted in* [1964] U.S. Code Cong. & Ad. News 2355, 2516. Title VII provides that

> (a) It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2.

In *City of Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702, 712 n.23 (1978), the Supreme Court stated that pension benefits are "compensation" under Title VII, and held that Title VII was violated by an employer-run pension plan that paid all similarly-situated employees equal retirement

benefits, but required its female employees, while working, to make larger contributions to the pension fund than its male employees were required to make. In *Manhart* the Court acknowledged that "[a]s a class women live longer than men," 435 U.S. at 704, and that the differential treatment received by individual women was based upon actuarially-sound projections as to the total amount of benefits likely to be received by women as a class. The Court pointed out, however, that Title VII's "focus on the individual is unambiguous. It precludes treatment of individuals as simply components of a racial, religious, sexual, or national class." *Id.* at 708. In addition, the Court found that, "[e]ven a true generalization about the class is an insufficient reason for disqualifying an individual to whom the generalization does not apply." *Id.* Because there is no way of knowing prior to or at the time of retirement, which *individual* female retirees will fulfill actuarial predictions as to longevity and in fact live longer than the average male retiree, a requirement that *all* female employees make larger contributions than *all* male employees penalizes all female retirees who do *not* actually live longer than the average male retiree. Such a result, the Supreme Court held, violates Title VII because it does not "pass the simple test of whether the evidence shows 'treatment of a person in a manner which but for that person's sex would be different.' " *Id.* at 711 (footnote omitted).

Like the district judge, we can discern no meaningful distinction between the disparate treatment accorded the female employees in *Manhart,* who were required to contribute a larger percentage of their salaries while working in order to receive monthly retirement benefits equal in amount to those received by their male counterparts, and the disparate treatment acorded the female TIAA-CREF participants in this case. Although female TIAA-CREF participants make contributions to their retirement accounts that are equal in amount to those made by their male counterparts, they are paid a smaller monthly benefit upon retirement simply because they are women. Every federal court that has considered the issue has found that no legally significant difference exists between unequal contributions for equal payments and equal contribu-

tions for unequal payments. *See, e.g., Retired Public Employees' Association of California v. California,* 677 F.2d 733, 735 (9th Cir. 1982); *Norris v. Arizona Governing Committee for Tax Deferred Annuity,* 671 F.2d 330, 334 (9th Cir. 1982), *cert. pet. filed,* Docket No. 82-52 (U.S.L.W. July 27, 1982); *EEOC v. Colby College,* 589 F.2d 1139, 1144 (1st Cir. 1978); *Women in City Government United v. City of New York,* 515 F. Supp. 295, 298 (S.D.N.Y. 1981); *Hannahs v. Teachers' Retirement System,* 26 FEP Cases 527, 530 (S.D.N.Y. 1981); *Peters v. Wayne State Univ.,* 476 F. Supp. 1343, 1350 (E.D. Mich. 1979). In fact, it would seem that if there is any meaningful distinction between the two types of sex-based plans, it is the TIAA-CREF type of unequal benefit plan that is more in conflict with the spirit and purposes of Title VII. Each female TIAA-CREF plan participant is maintained at a lower economic level than her male counterparts for as long or short a time as she is alive to receive benefits, regardless of whether she is ultimately one of the few who outlives the average male participant or is one of the 84% of all women who do not outlive their male counterparts. *See Norris v. Arizona Governing Committee, supra,* 671 F.2d at 332 n.1.

The period of time over which the female TIAA-CREF participant will receive the lower benefits awarded her under the present plans is both indefinite and unknowable at the time of retirement. In addition, this lesser benefit will be received at a time when most often the recipient must live on a fixed income, and is unable to increase her benefits as she might increase her salary by working for a promotion during her working years. It is also received at a time—in her older years—when the amount of dollars available to her is apt to crucially affect her ability to meet her basic needs. It was largely because of its concern with this dependence on pension benefits in workers' retirement years that Congress enacted the Employee Retirement Income Security Act, 29 U.S.C. § 1001 *et seq.* ("ERISA"), in 1974. The House Committee stated in this regard that ERISA's "most important purpose will be to assure American workers that they may look forward, with anticipation, to a retirement with financial security and dignity,

and without fear that this period of life will be lacking in the necessities to sustain them as human beings in our society." H.R. Rep. No. 533, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. Code Cong. & Ad. News 4639, 4646.

Defendants attempt to argue that the TIAA-CREF plans are fair to both men and women because each individual participant receives a benefit package that is of actuarially equal value. This argument is unconvincing because it is only by virtue of defining an individual in terms of the prohibited classification that the actuarially equal result is reached. It is this very act of classification that results in unfairness to individual members of the class in violation of the clear mandate that compensation, conditions and benefits of employment are to be tested by their disparate effect on individuals rather than groups.

In the time elapsed since its decision in *Manhart* the Supreme Court has not modified in any way its focus on "fairness to individuals rather than fairness to classes," 435 U.S. at 709, in Title VII cases. To the contrary, in *Connecticut v. Teal,* 50 U.S.L.W. 4716 (U.S. June 21, 1982), the Supreme Court held that where a promotional examination had a racially disparate impact on blacks, the employer could not defend the use of the exam on the ground that a higher than average percentage of the blacks who did pass the test were in fact promoted, with the result that the "bottom line" impact was not only nondiscriminatory, but was actually more favorable to blacks as a group than to whites. In reaching its decision the Court stated that "[i]t is clear that Congress never intended to give an employer license to discriminate against some employees on the basis of race or sex merely because he favorably treats other members of the employee's group." 50 U.S.L.W. at 4720.

We also reject defendants' claim that it would be unfair to equalize the monthly benefits to be received by male and female annuitants because men, as a class, will then receive less total benefits than will women as a class. First, this argument loses sight of the need to focus on impact on individuals as opposed to impact on a class. Further, under an equal benefit system each individual male annuitant will be treated in exactly

the same way as each of his female counterparts. Under such a system, an individual male annuitant will be disadvantaged only as compared to his male counterparts who have in the past received larger benefits as a result of TIAA-CREF's sex-based discrimination in their favor. Male participants in TIAA-CREF are not being treated unequally when the risk that each and every annuitant, male and female, will live longer than the average is spread across the entire covered population rather than being imposed on one sub-group within that total population. The fact that such equal spreading of risk may have the result that, from a statistical point of view, men as a *class* subsidize somewhat the benefits received by women as a *class* is irrelevant in the context of a statute that seeks fairness to *individuals,* and is not, in any event, contrary to the continuing intent of Congress, as such intent was evidenced in 1978, when it amended Title VII to overrule the Supreme Court's decision in *General Electric Co. v. Gilbert,* 429 U.S. 125 (1976).

In *Gilbert* the Supreme Court held that an employer's disability benefits plan that failed to provide coverage for pregnancy-related disabilities did not discriminate against women in violation of Title VII. Congress quickly responded to this decision by adding 42 U.S.C. § 2000e(k) to Title VII. That section provided that

> The terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work . . . .

Congress was aware that this amendment would increase the cost of work-related disability and health insurance plans, *see* H.R. Rep. No. 948, 95th Cong., 2d Sess., *reprinted in* [1978] U.S. Code Cong. & Ad. News 4749, 4757-58, and specifically understood and intended that in the case of contributory

programs the amendment would require that *all* employees—not just women—would be assessed their proportionate portion of the incremental cost. *Id.*, [1978] U.S. Code Cong. & Ad. News at 4756.

We find, therefore, that TIAA-CREF's use of sex-distinct mortality tables constitutes unequal treatment based solely on an individual's sex. In order for this practice to violate Title VII, however, the unequal treatment must be practiced by an "employer." It is clear that plaintiff's contract for retirement benefits is not with LIU, but with TIAA-CREF, an independent insurer. Plaintiff clearly is not an employee of TIAA-CREF in any commonly understood sense. However, it is generally recognized that "the term 'employer,' as it is used in Title VII, is sufficiently broad to encompass any party who significantly affects access of any individual to employment opportunities, regardless of whether that party may technically be described as an 'employer' of an aggrieved individual as that term has generally been defined at common law." *Vanguard Justice Society, Inc. v. Hughes,* 471 F. Supp. 670, 696 (D. Md. 1979). *See also Baker v. Stuart Broadcasting Co.*, 560 F.2d 389, 391 (8th Cir. 1977); *Sibley Memorial Hospital v. Wilson,* 488 F.2d 1338 (D.C. Cir. 1973); *EEOC v. Wooster Brush Co.*, 523 F. Supp. 1256, 1261-62 (N.D. Ohio 1981); *Puntolillo v. New Hampshire Racing Commission,* 375 F. Supp. 1089 (D.N.H. 1974).

We agree with the district judge that TIAA and CREF, which exist solely for the purpose of enabling universities to delegate their responsibility to provide retirement benefits for their employees, are so closely intertwined with those universities, (in this case LIU), that they must be deemed an "employer" for purposes of Title VII. It is also relevant that participation in TIAA-CREF is mandatory for tenured faculty members at LIU, and that LIU shares in the administrative responsibilities that result from its faculty members' participation in TIAA-CREF.

In addition, the language of the Supreme Court in *Manhart* would seem to compel a finding that delegation of responsibility for employee benefits cannot insulate a discriminatory plan

from attack under Title VII. The Court stated therein that it did not wish to "suggest, of course, that an employer can avoid his responsibilities by delegating discriminatory programs to corporate shells. Title VII applies to 'any agent' of a covered employer . . . ." 435 U.S. at 718 n.33. Finally our conclusion here is in accord with that of a number of other courts. These courts have recognized that exempting plans not actually administered by an employer would seriously impair the effectiveness of Title VII, and have held *Manhart* applicable to pension plans run by third-party insurers. *See Norris v. Arizona Governing Committee for Tax Deferred Annuity*, 671 F.2d 330 (9th Cir. 1982), *cert. pet. filed*, Docket No. 82-52 (U.S.L.W. July 27, 1982); *EEOC v. Colby College*, 589 F.2d 1139, 1141 (1st Cir. 1978) (holding TIAA-CREF subject to Title VII); *EEOC v. Wooster Brush Co.*, 523 F. Supp. 1256, 1266 (N.D. Ohio 1981); *Peters v. Wayne State Univ.*, 476 F. Supp. 1343, 1350 (E.D. Mich. 1979) (holding TIAA-CREF subject to Title VII).

IV. *Impact of the McCarran-Ferguson Act*

Having determined that the TIAA-CREF benefit systems discriminate against women in violation of Title VII, we must determine whether there is any countervailing federal law or policy which renders Title VII inapplicable to TIAA and/or CREF. TIAA and CREF contend that because they are engaged in the business of insurance they are exempted from compliance with Title VII by virtue of the McCarran-Ferguson Act, 15 U.S.C. § 1011 *et seq.* ("the McCarran Act").

The McCarran Act provides, in pertinent part, that

> [n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance. . . .

15 U.S.C. § 1012(b).

The McCarran Act will exempt defendants TIAA and/or CREF from conforming their operations to the mandates of

Title VII only if (1) defendants are engaged in the business of insurance; (2) Title VII does not specifically relate to the business of insurance; and (3) Title VII, as construed, invalidates, impairs, or supersedes a state law enacted to regulate the business of insurance. The district judge looked to each of these criteria and concluded that the McCarran Act exempted TIAA, but not CREF, from the requirements of Title VII. We find that the McCarran Act exempts neither TIAA nor CREF from such compliance, and reverse the ruling below as to TIAA.

Judge Ward found that the McCarran Act did not exempt CREF from compliance with Title VII because CREF was not in the business of insurance. We agree. CREF is a variable annuity company.[8] As such it does not commit itself to pay a pre-determined amount of benefit each month. How much it actually does pay is determined periodically, and directly reflects the results of the fund's investment policies. Thus, a variable annuity company is not subject to the risk that its obligations will exceed its return on investments.

As the Supreme Court noted in *SEC v. Variable Annuity Co.*, 359 U.S. 65, 71 (1959), variable annuity plans like CREF have a number of the characteristics of insurance. The variable annuity company pays its annuitant on a periodic basis, and continues to do so until the death of the annuitant, or for a fixed period; payments are made from both income and principal; and the amount of benefit each annuitant receives is calculated on the basis of traditional actuarial principles which take into account, *inter alia*, age and sex. Finally, the issuer assumes the risk of mortality—that is, that the annuitant will live longer than predicted on an actuarial basis. Nevertheless, the *Variable Annuity* Court found that "absent some guarantee of fixed income, the variable annuity places all the investment risks on the annuitant, none on the company. The holder gets only a *pro rata* share of what the portfolio of equity interests reflects—which may be a lot, a little, or nothing." *Id.* (foot-

8 The Supreme Court noted in *SEC v. Variable Annuity Co.*, 359 U.S. 65, 69 (1959), that CREF was the first variable annuity company in the United States.

note omitted). The Court then went on to hold that since the "concept of 'insurance' involves some investment risk-taking on the part of the company," the issuer of variable annuity contracts is not engaged in the business of insurance and is not protected from federal regulation by virtue of the McCarran Act. *Id. See also Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 211-12 (1979). Therefore, the district judge was correct in holding that CREF is not in the business of insurance and is required to comply with the mandate of Title VII.

On the other hand, TIAA commits itself, at the time a plan participant retires, to pay the retiree a specific, fixed amount of money each month. As a result, TIAA is subject to investment risk. Since its contracts, like those issued by CREF, have the other characteristics of insurance contracts, we will assume, as TIAA contends and as the district judge found, that TIAA is in the business of insurance. Our next step, then, is to determine whether Title VII specifically relates to the business of insurance. If not, we must then determine whether a holding that TIAA must pay equal monthly benefits to all of its annuitants would be a holding in which we construed an Act of Congress so as to invalidate, impair, or supersede a state law enacted to regulate the business of insurance in violation of the McCarran Act.

The McCarran Act was enacted in 1945 in direct reaction to the Supreme Court's decision in *United States v. South-Eastern Underwriters Assoc.*, 322 U.S. 533 (1944), one year before. In *South-Eastern Underwriters* the Court held that insurance companies involved in insurance transactions across state lines were engaged in interstate commerce and subject to federal regulation under the Commerce Clause. Therefore, the Court found, the price-fixing activities of such insurance companies were subject to attack under the Sherman Antitrust Act. This holding created the fear that traditional forms of state regulation and taxation of insurance companies doing business within the state could be invalidated on Commerce Clause grounds, and that the insurance industry would be thrown into chaos as a result. Thus, Congress' purpose in adopting the

McCarran Act was only to ensure that the states would be permitted to fulfill their traditional role in relation to insurance regulation. As stated by the Supreme Court, the intent was, first, "to assure that the States are free to regulate insurance companies without fear of Commerce Clause attack," *Group Life & Health Ins. Co. v. Royal Drug Co., supra*, 440 U.S. 205, 218 n.18, and, second, to give insurance companies only a limited exemption from the antitrust laws. *Id. See also SEC v. National Securities, Inc.*, 393 U.S. 453, 458-59 (1969) ("Congress was mainly concerned with the relationship between insurance ratemaking and the antitrust laws, and with the power of the States to tax insurance companies."). According to the legislative history, it was "not the intention of Congress to clothe the States with any power to regulate or tax the business of insurance beyond that which they had been held to possess prior to the decision . . . in the *South-Eastern Underwriters Association* case." H.R. Rep. No. 143, 79th Cong., 1st Sess., *reprinted in* [1945] U.S. Code Cong. Svce. 670, 671 (Feb. 13, 1945).

We find, based on the historical context, the legislative history, and judicial interpretations of that history, that Congress, in enacting a statute primarily intended to deal with the conflict between state regulation of insurers and the federal antitrust laws, had no intention of declaring that subsequently enacted civil rights legislation would be inapplicable to any and all of the activities of an insurance company that can be classified as "the business of insurance." *Accord, EEOC v. Wooster Brush Co.*, 523 F. Supp. 1256, 1265 (N.D. Ohio 1981); *Women in City Government United v. City of New York*, 515 F. Supp. 295, 302-03 (S.D.N.Y. 1981).

The view that the McCarran Act does not render Title VII inapplicable to an employment-related pension plan finds further support in the Congressional debates surrounding the enactment of ERISA (a statute which clearly "specifically relates to the business of insurance") in 1974. It is clear from those debates that the members of Congress believed that Title VII did specifically prohibit racial and sex-based discrimination in pension benefit programs. As summarized by the Seventh Circuit:

> Senator Mondale and Representative Abzug sought to include in ERISA provisions prohibiting discrimination in the administration of welfare benefit plans. Senator Williams assured Senator Mondale that such an amendment would be unnecessary and might undermine federal anti-discrimination efforts, stating: 'I believe that . . . centralized administration of nondiscrimination in employment must be maintained. And I believe this can be done by the Equal Employment Opportunities Commission under terms of existing law.' 119 Cong. Rec. 30409 (1973). Representative Dent reiterated in the House that discrimination could best be prohibited 'under terms of existing law.' 120 Cong. Rec. 4726 (1974). On this basis, ERISA was not amended to prohibit discrimination.

Bucyrus-Erie Co. v. Dept. of Industry, Labor & Human Relations, 599 F.2d 205, 211-12 (7th Cir. 1979), *cert. denied*, 444 U.S. 1031 (1980). *See also Women in City Government United v. City of New York*, 515 F. Supp. 295, 304-05 (S.D.N.Y. 1981).

Furthermore, in this case Title VII is not being *construed* to *implicitly* pre-empt state laws. Title VII contains a broad and explicit pre-emptive provision. *See* 42 U.S.C. § 2000e-7. That section provides that:

> Nothing in this subchapter shall be deemed to exempt or relieve any person from liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter.

To the extent that New York law either permits, or seeks to enforce the use, or continued use, of gender-based mortality tables in violation of Title VII, it is clearly pre-empted under § 2000e-7. The McCarran Act was never meant to prevent, and could not prevent, Congress from explicitly imposing require-

ments on employers and their agents under the civil rights statutes, the National Labor Relations Act, or any other statute that seeks to enforce compliance with federal policies in such fields as civil rights, labor and other areas of national concern.

We hold, therefore, that Title VII explicitly pre-empts New York insurance laws to the extent that they "require or permit" a method of calculating pension benefits that we have found to be "an unlawful employment practice" under Title VII. Therefore, the McCarran Act does not exempt TIAA from complying with the dictates of Title VII. Having so held, we need not reach the question whether application of Title VII will invalidate, impair, or supersede New York State insurance law.[9]

It is to be noted, however, that although the State Superintendent of Insurance has approved two sets of proposed unisex mortality tables for calculation of benefits based on contributions made after the date the new plans are approved, he has indicated that he will not approve such tables for use in calculating benefits based on contributions made prior to the effective date of the new plans. Obviously, our holding that Title VII pre-empts state insurance law with which it conflicts dictates that where the relief ordered necessarily has an impact on contributions paid to TIAA and CREF prior to the effective date of our order, the New York State Superintendent of Insurance will be precluded from disapproving plans designed to conform with the order.[10]

V. *Relief*

Judge Ward enjoined CREF from using sex-based mortality tables to calculate the number of annuity units to which plan participants are entitled upon their retirement on or after May

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9 In light of our holding that Title VII applies to both TIAA and CREF and that it has been violated by their sex-based method of calculating retirement benefits, we need not reach the secondary issues raised on appeal.

10 We note that the Superintendent has indicated that he will, of course, comply with a final order of this Court.

1, 1980. He also enjoined LIU from making contributions on behalf of its employees, and/or from requiring its employees to contribute to any retirement plan that continued to use sex-based mortality tables after June 1, 1980. In reviewing an award of relief we must determine whether the judge below abused his discretion "to locate a 'just result' in light of the circumstances peculiar to the case." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 424-25 (1975) (quoting *Langnes v. Green*, 282 U.S. 531, 541 (1931)).

In light of our holding that TIAA is subject, as is CREF, to the mandate of Title VII, any relief awarded to plaintiff will apply equally against both.

The order enjoining LIU from making contributions to any pension fund making use of sex-based mortality tables to calculate benefits accruing as a result of contributions made after June 1, 1980, logically follows from the holding that the use of such tables constitutes discrimination on the basis of sex in violation of Title VII, and must be affirmed. It is also clear that the part of Judge Ward's order requiring CREF to use gender-neutral mortality tables to calculate benefits that result from contributions made after the effective date of the order, May 1, 1980, must be affirmed, and extended to include TIAA. Defendants have already attempted to revise their practices to conform to the above. However, they have not presented for approval gender-neutral tables for the calculation of benefits based on contributions made prior to May 1, 1980, but first payable upon a plan participant's retirement after that date. Instead, they have argued that any further relief would be improper since it would "retroactively" affect the value of contributions made prior to the district court's order in this case. They contend that the *Manhart* Court's rejection of the plaintiffs' claims for retroactive relief in that case dictates that no retrospective relief is available here. Assuming, without deciding, that the part of Judge Ward's order that affects the value of contributions made prior to the entry of judgment in this case constitutes retroactive relief, nothing in *Manhart* proscribes such a result. The *Manhart* Court itself pointed out that "[t]o the point of redundancy, the statute stresses that

retroactive relief 'may' be awarded if it is 'appropriate,' " 435 U.S. at 719, and that the "presumption in favor of retroactive liability can seldom be overcome." *Id.* The Court then went on to find that under the special circumstances presented in that case retroactive relief was not "appropriate." In so finding the Court stated:

> For several reasons, we conclude that the District Court gave insufficient attention to the equitable nature of Title VII remedies. Although we now have no doubt about the application of the statute in this case, we must recognize that conscientious and intelligent administrators of pension funds, who did not have the benefit of the extensive briefs and arguments presented to us, may well have assumed that a program like the Department's was entirely lawful . . . . [P]ension administrators could reasonably have thought it unfair—or even illegal—to make male employees shoulder more than their 'actuarial share' of the pension burden. *There is no reason to believe that the threat of a backpay award is needed to cause other administrators to amend their practices to conform to this decision.*

435 U.S. at 722-23 (footnotes omitted) (emphasis added). The Supreme Court then characterized its decision as a "marked departure," 435 U.S. at 722, from past practice, and stated that since retroactive relief in the form of refunds to women of the additional moneys they had paid into the fund in the past would constitute an enormous unforeseen liability that would threaten the solvency of the fund, a "backpay award" was unjustified. In this case, however, none of the factors that influenced the *Manhart* Court is present to render "inappropriate" an order of relief that affects the value of contributions paid to the pension fund prior to the entry of judgment below. First, *Manhart* was decided by the Supreme Court over four years ago. Since the decision of that case a number of federal district courts and courts of appeals have declared plans like those at issue here to be unlawful in light of *Manhart*. *See*

Retired Public Employees' Association of California v. California, 677 F.2d 733 (9th Cir. 1982); *Norris v. Arizona Governing Committee for Tax Deferred Annuity*, 671 F.2d 330 (9th Cir. 1982), *cert. pet. filed*, Docket No. 82-52 (U.S.L.W. July 27, 1982); *EEOC v. Colby College*, 589 F.2d 1139 (1st Cir. 1978); *Women in City Government United v. City of New York*, 515 F. Supp. 295 (S.D.N.Y. 1981); *Hannahs v. Teachers' Retirement System*, 26 FEP Cases 527 (S.D.N.Y. 1981); *Peters v. Wayne State Univ.*, 476 F. Supp. 1343 (E.D. Mich. 1979). The record indicates further that in 1974, as a result of the Secretary of Labor's public request for comments on proposed sex discrimination guidelines, TIAA-CREF wrote to its member institutions in order to encourage them to oppose regulations requiring the use of gender-neutral mortality tables. *See* JA 485-87. In addition, this suit was filed against TIAA-CREF in April, 1974. The *Peters* action was filed in 1976. 476 F. Supp. 1343, 1345. In 1978 the First Circuit reversed the Maine District Court's grant of summary judgment in favor of defendants in *EEOC v. Colby College*, 589 F.2d 1139 (1st Cir. 1978), and remanded for further proceedings. Both *Peters* and *Colby College*, as well as other suits not yet decided, involved TIAA-CREF, and certainly put defendants TIAA-CREF on notice as to the questionability of their practices. They have had ample opportunity to "voluntarily" revise their mortality tables. The possibility of an order such as that entered by the district court, and by this court today, was foreseeable at least since 1974.[11]

It also must be recognized that the "retroactive" relief awarded here is not nearly so drastic as that sought by

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11 The pension plan at issue in *Manhart* had been altered to equalize both contributions and benefits for male and female employees by the time that case reached the Supreme Court. The change was effective on January 1, 1975, *see* 435 U.S. at 706, prior to the affirmance of the district court's order by the Ninth Circuit. The plan at issue in *Retired Public Employees' Association of California v. California*, 677 F.2d 733 (9th Cir. 1982), also was amended in 1977 to equalize contributions and benefits for male and female employees. *Id.* at 734 n.1.

plaintiffs and awarded by the district court in *Manhart*. There the district court's order that all female employees and retirees receive refunds of all excess contributions made to the plan since April 5, 1972, when Title VII became applicable to governmental employers, *see Manhart v. City of Los Angeles Dept. of Water & Power*, 553 F.2d 581, 583 (9th Cir. 1976), *vacated and remanded*, 435 U.S. 702 (1978), required Plan administrators to remove money from the fund for this purpose. The fund would nevertheless have been required, at the same time, to meet undiminished obligations. In the present case a "retroactive" award does not require the wholesale removal of moneys from TIAA-CREF reserves. The equalization of the amount of monthly payments to be received by similarly-situated male and female employees can be calculated so as not to change the total anticipated obligations of the funds. A result which did not affect past contributions and granted only "prospective" relief, as that is defined by defendants, would effectively postpone full conversion to gender-neutral tables for as much as 30 to 40 years.

Finally, we must reject the argument that an award of relief that adversely affects the value of contributions made by or on behalf of male employees prior to the date of the order herein will unfairly violate those males' expectations of receiving pension benefits based on mortality tables that discriminate in their favor. First, this argument assumes that male employees had some *clearly settled* expectations that *will be* violated. On the contrary, the literature distributed to TIAA-CREF participants emphasizes the difficulty involved in accurately predicting the amount of retirement annuity income to be expected by an individual participant. The literature states that:

> The amount of your retirement income will depend on the number of years you participate in the plan, the amount of premiums paid each year during your participation, your age at time of retirement, the experience of TIAA and CREF, the income option you select at retirement, and other factors. Although it is not possible to predict the effect of each of these factors upon your retirement

> income, the remaining portion of this booklet should be helpful in calculating the benefits that would be produced under certain conditions.

"TIAA-CREF: Your Retirement Annuity" at 14, JA 233. Later in the same publication it is stated that "[j]ust as you can't predict your future salary or retirement age, neither can TIAA predict economic and social conditions. Therefore, the TIAA annuity amounts may be greater or less than those shown because of the following factors: . . ." *Id.* at 16, JA 234. It is then stated, *inter alia*, that on three months' notice TIAA can establish a new rate schedule for future premiums. *Id.* While TIAA does guarantee its participants certain minimal monthly payments, the amounts guaranteed are so low—since they are figured on the basis of a 2½% return on investments, *see* JA 197—that there is no danger that the male participants' expectation that they will receive the minimal guaranteed benefit will be jeopardized by the relatively minor changes in the value of past benefits necessitated by the relief ordered herein.

CREF, on the other hand, guarantees plan participants no specified amount of monthly payments. The TIAA-CREF publication which explains the CREF system states that:

> The CREF annuity pays you a retirement income that varies year by year, reflecting primarily the experience of the securities in CREF's portfolio. When you retire, your accumulation units are converted into a lifetime monthly income of a fixed number of 'annuity units.' . . . The number of annuity units payable to you each month for life depends on such factors as how many accumulation units you own at time of retirement, the age at which you retire, your sex, and whether you choose an income method that continues payments to a beneficiary after your death.

"TIAA-CREF—CREF Units at Work" at 3; JA at 415. Based on statements such as this, no employees could have had settled expectations as to the amount of monthly benefits they would receive upon retirement.

While it is true that the above-quoted literature states, as does other literature sent to TIAA-CREF participants, that sex will be considered in calculating the amount of monthly benefits to be received after retirement, these statements are neither so clear, nor are they highlighted in such a way, that it is plausible to think that male plan participants relied upon them in any meaningful way. In any case, such statements would not be a major factor in inducing men to participate in TIAA-CREF plans. First, at least at LIU, participation has been mandatory for most covered employees. Second, the uniqueness of TIAA-CREF, particularly its qualities of immediate vesting and portability, would constitute inducements to participation more powerful than the belief that men's benefits would be paid at a rate higher than those paid to similarly-situated women. It is also not clear that men could actually do better purchasing a plan on the open market than they will by participating in TIAA-CREF plans that make use of gender-neutral tables, given the economies of scale that would presumably be present in the administration of such a large group plan. Further, the benefits to be received by many male participants will be unaffected by the shift to gender-neutral tables because approximately 60% of all male participants select a joint-survivor option which provides for an income that continues for the duration of their wives' lifetimes as well as their own. *See* TIAA-CREF, *The Participant* (March, 1980) at 2, JA 550. Since in these cases actuarial projections as to the wives' likelihood of surviving, based on sex-based mortality tables, have always been figured into the calculation of the amount of benefits to be received by their husbands upon retirement, the change will have little or no impact on the benefits to be received by these men. *Id.*[12]

Finally, reliance on the continued use of sex-distinct mortality tables by male pension plan participants was unjustified in

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12 Thus, the changes mandated by this decision will reduce the benefits that would be received by approximately 40% of male TIAA-CREF participants, based on sex-distinct mortality tables, by between 1% and 8%. *See* TIAA-CREF, *The Participant* (March, 1980) at 2, JA 550.

light of the visibility of the issue of the legality of using such tables, at least since it was brought to the attention of all participants in 1973. *See* TIAA-CREF, *The Participant* (July, 1973), JA 477-84.

A delayed award such as that which defendants contend is proper would fly in the face of the primary purpose of Title VII—to "make persons whole for injuries suffered on account of unlawful employment discrimination." *Albemarle Paper Co. v. Moody,* 422 U.S. 405, 418 (1975). We therefore hold that CREF was properly enjoined from using sex-distinct mortality tables to calculate the number of annuity units to which all persons retiring after May 10, 1980 [sic] are entitled, and TIAA is now similarly enjoined from using sex-distinct mortality tables to calculate the amount of monthly benefits to which its participants are entitled upon retirement. This order will affect all calculations of retirement benefits made after May 1, 1980, as per the stipulation between the parties dated March 29, 1982. JA 792-93. In addition, LIU was properly enjoined from making contributions to, or requiring its employees to make contributions to, any pension fund that continues to use gender-based mortality tables to calculate retirement benefits for employees retiring after June 1, 1980. *See* JA 792-93.

Affirmed in part, reversed in part, and remanded for further proceedings not inconsistent with this opinion.

Opinion of the District Court dated January 23, 1976

DIANA L. SPIRT, etc.,

Plaintiff,

—against—

TEACHERS INSURANCE AND ANNUITY ASSOCIATION, *et ano.*,

Defendants.

No. 74 Civ. 1674

United States District Court,
Southern District of New York
January 23, 1976

Plaintiff Diana L. Spirt ("Spirt") moves pursuant to Rule 56, Fed. R. Civ. P., for partial summary judgment declaring certain actuarial tables used by defendants in annuity contracts with plaintiff to be violative of the Constitution and statutes of the United States and for class action certification pursuant to Rule 23, Fed. R. Civ. P. Defendants Teachers Insurance and Annuity Association of America ("TIAA") and College Retirement Equities Fund ("CREF") cross-move pursuant to Rule 56, Fed. R. Civ. P., for summary judgment dismissing this action.

Pending decision of the cross-motions for summary judgment, plaintiff's motion for class action certification was adjourned. After that postponement, defendants moved under Rule 12(h)(2), Fed. R. Civ. P., for dismissal of the complaint for failure to join indispensable parties as required by Rule 19, Fed. R. Civ. P. Rule 19 is expressly "subject to the provisions of Rule 23." Inasmuch as it involves determinations of the appropriate classes of persons involved in this litigation, defendants' motions will be considered in conjunction with plaintiff's Rule 23 motion.

Plaintiff, a female professor at Long Island University, charges sex discrimination in the operation of a pension plan administered by defendants. This pension plan utilizes actuarial tables which indicate that women at retirement age have a longer life expectancy than do men at that same age. Consequently, the amount of each periodic payment made to a female annuitant selecting a single-life option is smaller than that paid her male counterpart. Use of sex-based tables and the disparity in treatment which results, Spirt claims, constitute violations of the Fourteenth Amendment to the Constitution, 42 U.S.C. § 2000(e)(1) *et seq.* ("Title VII"), 42 U.S.C. § 1981 *et seq.*, and the Equal Pay Act of 1963, 29 U.S.C. § 209(d). TIAA and CREF deny that their pension plan unlawfully discriminates asserting instead that the plan has a demonstrably rational and equitable basis.

Summary judgment is appropriate only if the record clearly indicates that no genuine issue of material fact exists. In several recent cases, the Second Circuit has indicated that summary judgment should be selectively granted. *Heyman* v. *Commerce & Industry Insurance Company*, Docket No. 75-7230 (2d Cir. Oct. 24, 1975); *Judge* v. *Buffalo*, Docket No. 75-7314 (2d Cir. Oct. 24, 1975). In the words of the Court of Appeals:

> [T]he "fundamental maxim" remains that on a motion for summary judgment the court cannot try issues of fact; it can only determine whether there are issues to be tried. *American Manuf. Mutual Ins. Co.* v. *American Broadcasting Paramount Theatres, Inc.*, 388 F.2d 272, 279 (2d Cir. 1967); *Cali* v. *Eastern Airlines, Inc.*, 442 F.2d 65, 71 (2d Cir. 1971). Moreover, when the court considers a motion for summary judgment, it must resolve all ambiguities and draw all reasonable inferences in favor of the party against whom summary judgment is sought, *United States* v. *Diebold, Inc.*, 369 U.S. 654, 655 (1962), with the burden on the moving party to demonstrate the absence of any material factual issue geniunely in dispute, *Adickes* v. *Kress & Co.*, 398 U.S. 144, 157 (1970). *Heyman, supra.*

See also, *Jaroslawicz* v. *Seedman*, Docket No. 75-7299 (2d Cir. Dec. 19, 1975).

In language which speaks directly to this action the Second Circuit recently stated:

> The fact that both sides in the instant case sought summary judgment does not make it more readily available. *American Manuf. Mutual Ins. Co.* v. *American Broadcasting—Paramount Theatres, Inc.*, 388 F.2d 272, 279 (2 Cir. 1967). Although all the litigants claim that the insurance policy is unambiguous, they sharply disagree over the meaning of the batch clause and the intent behind its addition to the contract; the affidavits also place in issue the understanding and custom of the insurance industry regarding such clauses. Since these issues of material fact are controverted by the parties, further proceedings on the merits are needed. *National Life Insurance Co.* v. *Solomon and Schuster*, Docket No. 75-7294 (2 Cir. December 9, 1975), slip op. 939.
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> *Home Insurance Co.* v. *Aetna Casualty & Surety Co.*, Docket Nos. 75-7357, 75-7359 (2d Cir. Jan. 13, 1976).

Faced with such a clear directive from the Court of Appeals, this Court is compelled to deny summary judgment if issues of fact remain outstanding.

Comparison of the statements of material facts submitted by the parties indicates that questions of fact do exist. For one, there is an apparent dispute as to whether Spirt complied with the procedures mandated by 42 U.S.C. § 2000 e-5, which defer filing of a charge with the Equal Employment Opportunities Commission ("EEOC") until 60 days after proceedings have been commenced before a state or local unlawful employment practices agency. Defendants claim that no proceedings were instituted before the New York State Division of Human Rights. Plaintiff responds by submitting a copy of a letter received from the EECO which she contends, "reflects the appropriate deference to the state and full compliance with Title VII." The letter, however, simply instructs plaintiff to communicate with the state agency to ensure that proceedings

were properly commenced. There is no indication that such action was taken. And, *Love* v. *Pullman*, 404 U.S. 522 (1972) cited by plaintiff, does not support her argument since in that instance there was evidence of an indication by the state agency that it declined to act. 404 U.S. at 525. The jurisdictional point raised presents a fact issue which prevents the Court from granting summary judgment.

Furthermore, the parties disagree over whether the contracts between TIAA and CREF and the annuitants constitute terms and conditions of employment. This mixed question of fact and law is essential to plaintiff's Title VII claim.

The tone, as much as the substance of the statements of material facts, indicates how inadvisable summary judgment would be at this juncture. Defendants have submitted what they denominate "Response to Plaintiff's Statement of Material Facts and Supplemental Statement of Material Facts." They proceed to take issue with plaintiff's statement, characterizing one item as "untrue" and claiming that another ignores certain facts. Throughout their papers the parties seem to be at odds over the most crucial aspect of this case: the actuarial tables themselves. The use and interpretation of these statistical compilations lies at the heart of the action and is essential to a determination of the issue on which plaintiff seeks partial summary judgment.

As noted above, summary judgment is inappropriate so long as issues of fact exist. It is evident that fact questions remain in this action. The claim in this case is a complex mix of fact and law, challenging, as it does, the use and construction of statistical data; a trial on the merits is indicated to disentangle the important questions presented. Accordingly, both plaintiff's motion for partial summary judgment and defendants' cross-motion for summary judgment are denied. The remaining motions are adjourned for thirty days from the date of this decision to enable the parties to submit any additional papers in connection with those motions.

It is so ordered.

/s/ ROBERT J. WARD
U. S. D. J.

Opinion of the District Court dated July 1, 1976

DIANA L. SPIRT, etc., *Plaintiff,*

—v.—

TEACHERS INSURANCE AND ANNUITY ASSOCIATION OF AMERICA et al., *Defendants.*

No. 74 Civ. 1674

United States District Court,
Southern District of New York

July 1, 1976

OPINION

ROBERT J. WARD, *District Judge.*

Plaintiff Diana L. Spirt ("Spirt") moves for class action certification pursuant to Rule 23, Fed.R.Civ.P. Defendants Teachers Insurance and Annuity Association of America ("TIAA") and College Retirement Equities Fund ("CREF") cross-move for an order pursuant to Rule 56, Fed.R.Civ.P., granting partial summary judgment in their favor and for an order pursuant to Rules 12(c) and 19(a), Fed.R.Civ.P., dismissing this action for failure to join indispensable parties. For the reasons hereinafter stated, the motions are denied with the exception of the motion to dismiss for failure to join indispensable parties which is conditionally granted in part.

Plaintiff, a female professor at Long Island University ("LIU"), charges sex discrimination in the operation of a pension plan administered by defendants. This pension plan utilizes actuarial tables which indicate that women at retirement age have a longer life expectancy than do men at that same age. Consequently, the amount of each periodic payment made to a female annuitant selecting a single-life option is

smaller than that paid her male counterpart. Use of sex-based tables and the disparity in treatment which results, Spirt claims, constitute violations of the Fourteenth Amendment to the Constitution, 42 U.S.C. § 2000(e)(1) *et seq.* ("Title VII"), 42 U.S.C. § 1981 et seq., and the Equal Pay Act of 1963, 29 U.S.C. § 206(d). TIAA and CREF deny that their pension plan unlawfully discriminates asserting instead that the plan has a demonstrably rational and equitable basis.

I. *Defendants' Motion for Partial Summary Judgment.*

Defendants move for partial summary judgment claiming that plaintiff has failed to comply with the jurisdictional prerequisites to a suit under Title VII. Two lapses in this regard are cited. First, the complaint in this action was filed on April 15, 1974 while no charge was filed with the Equal Employment Opportunities Commission ("EEOC") until on or about October 19, 1974. The EEOC issued a Notice of Right to Sue on August 4, 1975.

A Right to Sue letter has been held to have the effect of ratifying a prior filed suit. The Court in *Black Musicians of Pittsburgh v. Local* 60-471, *American Federation of Musicians,* 375 F.Supp. 902, 906-07 (W.D.Pa.1974) stated:

> Here, . . . the suit was brought *before* the issuance of the right to sue letter, even before the filing of the charge with the EEOC. Asserting one's rights too late is quite a different matter from asserting them too soon. *Henderson v. Eastern Freight Ways.* [460 F.2d 258 (4th Cir. 1972)] . . .. [T]he issuance of the right to sue letter, in effect, validated the pending suit making it unnecessary to file another suit. Under the circumstances, we do not think a dismissal of the complaint at this stage would fulfill the purposes of the [Civil Rights] Act.

Defendants renew their argument that plaintiff has not pursued her remedies at the state level, as mandated by the statute. In dealing with this matter, the Court is mindful of the recent decision by the Court of Appeals in *Egelston v. State*

University College at Geneseo, 535 F.2d 752 (2d Cir. June 7, 1976). The Court of Appeals noted that summary judgment must be used sparingly and observed:

> There is an additional factor equally vital to the resolution of this case. Title VII is rife with procedural requirements which are sufficiently labyrinthine to baffle the most experienced lawyer, yet its enforcement mechanisms are usually triggered by laymen. Were we to interpret the statute's procedural prerequisites stringently, the ultimate result would be to shield illegal discrimination from the reach of the Act. Prior decisions, both of the Supreme Court and of this Circuit have, for this reason, taken a flexible stance in interpreting Title VII's procedural provisions. We follow this realistic approach today.

Finally, the Court expressed a preference that such issues be left to trial.

Defendants' initial motion for summary judgment based upon plaintiff's alleged failure to pursue her state remedies was denied because factual questions remained. They now seem to have multiplied. A determination of the extent and nature of communications between Spirt and her attorney and the state authorities is best left to trial, where, for example, testimony could be adduced as to "the standard practice of the New York State agency." At that time also perhaps the meaning of the EEOC phrase "Failure to Proceed," can be clarified. At this point, these factual questions are open. This coupled with the Court of Appeals' implied directive that issues of compliance with Title VII's procedural demands be resolved at trial compels the Court to deny defendants' motion for partial summary judgment.

II. *Defendants' Motion to Dismiss for Failure to Join Indispensable Parties*

TIAA-CREF move to dismiss for failure to join indispensable parties. They claim that joinder of both the employer educational institution, LIU, and of all the male participants in the challenged pension system is mandated.

Rule 19(a), Fed.R.Civ.P., states in pertinent part:

> (a) *Persons to be Joined if Feasible.* A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest.

Briefly outlined, the operation of defendants' pension program, as described in their papers, is as follows. The plan is commonly established by resolution of the board of trustees of the educational institution. Provision is made for a particular percentage of salary to be contributed both by the institution and by the employee. There is no contract between TIAA and CREF and the institution; instead, an individual contract is sent by defendants to the employee.

TIAA-CREF claim that, should plaintiff succeed in this action, costs of the pension program will rise and these increased costs will likely be borne by the participating institutions. Therefore, LIU, as such an institution, has an interest in this litigation which requires its joinder. Additionally, defendants argue complete relief is impossible in the absence of the employer.

These contentions would appear to have merit. In *Barninger v. National Maritime Union,* 349 F.Supp. 803, 805 (S.D.N.Y.1972), it was determined that trustees of a pension plan would remain as party defendants where their involvement concerned more than "a mere administrative detail of pension trust administration." Here, LIU has chosen to adopt defendants' system and to contribute to it; this constitutes affirmative, active participation.

To join LIU is not to suggest its liability. *Hodgson v. School Board, New Kensington-Arnold School District,* 56 F.R.D. 393 (W.D.Pa.1972) involved a claim under the Equal Pay Act in which the defendant School Board sought to join the Union representing the employees whose compensation was at issue. The Court, in granting the School Board's motion, observed:

> This action endemically involves the potential for altering and restructuring the compensation provisions of the collective bargaining agreement between the defendant and the proposed defendants.

56 F.R.D. at 395.

The absence of a contract *per se* between the University and TIAA-CREF is not significant; the instant suit may yet alter the relationship between these institutions as embodied in and effectuated through the resolution and the individual contracts.

Additional support for the joinder of LIU is offered by *McDonald v. General Mills, Inc.,* 387 F.Supp. 24 (E.D. Cal.1974). In that action, a female student at Sacramento State College charged sex discrimination by employers who had interviewed through the College's Graduate Placement Center. The court joined the College as a party, "so that complete, consistent, and efficient settlement of the controversy can be achieved." 387 F.Supp. at 38.

Here, too, resolution of Spirt's claim that defendants' pension program is discriminatory requires the presence of her employer LIU. Without the University's participation, the challenged program could not operate. When an entity is more accurately described as an "active participant," rather than merely a "key witness," joinder is indicated. *Haas v. Jefferson National Bank,* 442 F.2d 394, 398 (5th Cir. 1971).

It should also be noted that in her charge to the EEOC, Spirt named both LIU and TIAA-CREF. Clearly, the relationship out of which the alleged discrimination grows is a triangular one. Rule 19(a), Fed.R.Civ.P., mandates the presence of LIU and the Court directs its joinder.

Defendants have also moved for the joinder of all the male participants in the pension plan, asserting that if the changes demanded by plaintiff are effectuated, the males will bear the burden of increased costs and may sue TIAA-CREF on a reverse discrimination theory. Thus, it is claimed, the males have an interest in the outcome of this suit and their absence poses a risk to the defendants.

Among the authorities cited by TIAA-CREF is *English v. Seaboard Coast Line Railroad Company,* 465 F.2d 43 (5th Cir. 1972). That case does indeed include a helpful discussion. While bowing to the discretion of an experienced trial judge in joining white employees in a suit by black workers charging racially discriminatory employment practices, the Court of Appeals observed that, "it is clear that Rule 19(a) has never required joinder in every case in which 'interests' of white persons may be adversely affected by a court decree terminating racially discriminatory practices." 465 F.2d at 46.

The Supreme Court, too, has recently dealt with the question of reverse discrimination. *Franks v. Bowman Transportation Co.,* 424 U.S. 747, 96 S.Ct. 1251, 47 L.Ed.2d 444, 44 U.S.L.W. 4356 (U.S. Mar. 24, 1976). In awarding retroactive seniority status to a class of black employees, the court confronted the argument that this would conflict with the economic interest of other workers.

> [I]t is apparent that denial of seniority relief to identifiable victims of racial discrimination on the sole ground that such relief diminishes the expectations of other, arguably innocent, employees would if applied generally frustrate the central "make-whole" objective of Title VII. These conflicting interests of other employees will of course always be present in instances where some scarce employment benefit is distributed among employees on the basis of their status in the seniority hierarchy. But, as we have said, there is nothing in the language of Title VII, or in its legislative history, to show that Congress intended generally to bar this form of relief to victims of illegal discrimination, and the experience under its remedial

> model in the National Labor Relations Act points to the contrary. Accordingly, we find untenable the conclusion that this form of relief may be denied merely because the interests of other employees may thereby be affected. "If relief under Title VII can be denied merely because the majority group of employees, who have not suffered discrimination, will be unhappy about it, there will be little hope of correcting the wrongs to which the Act is directed." *United States v. Bethelehem Steel Corp.*, 446 F.2d 652, 663 (C.A.2, 1971).

424 U.S. at 774, 96 S.Ct. at 1269, 44 U.S.L.W. at 4364.
In a footnote to this statement, the court cited the Fifth Circuit's decision in *Volger v. McCarty, Inc.*, 451 F.2d 1236, 1238-39 (1971):

> Adequate protection of Negro rights under Title VII may necessitate, as in the instant case, some adjustment of the rights of white employees. The Court must be free to deal equitably with conflicting interests of white employees in order to shape remedies that will most effectively protect and redress the rights of the Negro victims of discrimination.

424 U.S. 775, 96 S.Ct. at 1269, 44 U.S.L.W. at 4364 n. 35.

Title VII forbids sex discrimination as well as racial bias. In fashioning a remedy to correct violations of the Act, the courts cannot be deterred by fears of potential adverse impact upon beneficiaries of a discriminatory *status quo*. There can be no vested interest in an unlawful practice.

Since the male participants cannot legitimately assert a protectable interest, they need not be joined pursuant to Rule 19(a). And, their absence poses no threat to TIAA-CREF. If the challenged pension program is found to violate the laws prohibiting sex discrimination and defendants are ordered to alter its operation, the affected men could not succeed in a claim asserted against good faith compliance with such a decree. Accordingly, the male participants need not be joined.

III. *Plaintiff's Motion for Certification as a Class Action.*

Lastly, plaintiff's motion for certification as a class action must be determined. The Court is guided by the following provisions of Rule 23, Fed.R.Civ.P.:

> *(a) Prerequisites to a Class Action.* One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.
>
> *(b) Class Actions Maintainable.* An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
>
> * * * * * *
>
> (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

The discussion of the class action format in employment discrimination suits found in *Bradford v. Peoples Natural Gas Company, Inc.*, 60 F.R.D. 432, 435 (W.D.Pa.1973) is worth noting:

> As a general rule of thumb it might be said that where employment discrimination is urged on the basis of specific circumstances relating to the individuals involved, a class action would be inappropriate. The same would be true if the issue depended on construction or application of particular language in a statute or collective bargaining contract, where relitigation would normally be effectively barred by *res judicata*. The class action technique would be more appropriate however, where a general policy

> adverse to the advancement of womankind is involved, not directed towards particular individuals nor involving specific issues of law or fact, but having a general adverse impact on numerous individuals arising as a consequence of such policy.

In the Court's view, the instant action falls within the second category.

Defendants' practice of using sex-based actuarial tables is under attack in this action. This usage constitutes a definite fact issue. It does not relate to the discrete grievance of a single individual. Nor does it involve a generalized amorphous policy of refusing to hire or promote or confer certain benefits upon a specific disadvantaged group.

The issue in this suit is a narrow one and specifically directed at the actuarial tables utilized by defendants in the operation of their pension programs. The resolution of the question of whether their use constitutes sex discrimination would not be assisted by maintenance of this suit as a class action.

Judge Friendly, in *Galvan v. Levine,* 490 F.2d 1255, 1261 (2d Cir. 1973), *cert. denied,* 417 U.S. 936, 94 S.Ct. 2652, 41 L.Ed.2d 240 (1974), stated:

> [Rule 23(b)(2)] authorizes maintenance of a class action when "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." But insofar as the relief sought is prohibitory, an action seeking declaratory or injunctive relief against state officials on the ground of unconstitutionality of a statute or administrative practice is the archetype of one where class action designation is largely a formality, at least for the plaintiffs. As we have recently noted in *Vulcan Society v. Civil Services Comm'n,* 490 F.2d 387, 399 (1973), what is important in such a case for the plaintiffs or, more accurately, for their counsel, is that the *judgment* run to the benefit not only of the named plaintiffs but of all others similarly situated, see *Bailey v. Patterson,* 323 F.2d

> 201, 206-207 (5 Cir. 1963), *cert. denied,* 376 U.S. 910, 84 S.Ct. 666, 11 L.Ed.2d 609 (1964); cf. *United States v. Hall,* 472 F.2d 261, 266 (5 Cir. 1972), as the judgment did here. The State has made clear that it understands the judgment to bind it with respect to all claimants; indeed even before entry of the judgment, it withdrew the challenged policy even more fully than the court ultimately directed and stated it did not intend to reinstate the policy.
>
> The practical significance of the denial of class action designation was thus limited to the claim for a mandatory injunction ordering monetary restitution.

TIAA-CREF admit, in their memorandum opposing this motion that, "a decision in [plaintiff's] favor, practically speaking, would equally affect all participants in the future." Clearly, if defendants must abandon their use of sex-based actuarial tables they must do so with regard to all of those in the pension program, not simply the instant plaintiff.

Consequently, class action status here would be in Judge Friendly's words "largely a formality." Where certification would be unduly burdensome either to the Court or to one of the parties, the Court should not acquiesce in such a formalism.

One valid aim of a class action may be to secure, in a single suit, numerous small damage claims. Although monetary relief incidental to the grant of an injunction and declaratory judgment may be awarded in a Rule 23(b)(2) class action, *Lynch v. Sperry Rand Corporation,* 62 F.R.D. 78, 85 (S.D.N.Y.1973), it does not seem appropriate here. Back payments would only fall due if unisex actuarial tables were used retroactively. And, such back payments would be owed only to those women who had received pensions when sex-based tables were in use.

Defendants divide participants in the pension program into two categories: "deferred annuitants," those who are presently contributing, and "immediate annuitants," those who have chosen an option and are receiving their retirement benefits. Spirt is a "deferred annuitant" having not yet retired. She is not yet the recipient of a pension and therefore would not be

entitled to back payments owed to those whose retirement benefits were computed pursuant to a discriminatory formula. Consequently, Spirt cannot represent a class of such persons and her action cannot be certified as a class action for purposes of monetary relief.

This is not to suggest that plaintiff as an individual lacks standing to seek injunctive and declaratory remedies to halt TIAA-CREF in their use of certain tables. In *Rosen v. Public Service Electric & Gas Co.*, 477 F.2d 90, 94 (3d Cir. 1973), which challenged a private firm's pension plans, an active employee was found to have "a sufficient personal stake in the outcome of this case to assure that concrete adverseness will occur." Spirt's stake in the outcome, as a woman of 51 with vested rights in the program, is likewise sufficiently concrete so that she may press individually for a declaratory judgment and the grant of an injunction.

One further consideration militates against class action certification. Spirt purports to represent all the female participants in defendants' pension plans. These women are employed at many different institutions throughout the nation. The Court has determined that Spirt's employer, LIU, must be joined. If this suit were certified as a class action, logic would compel the conclusion that all the institutional participants in TIAA-CREF must be joined. Or, since Rule 19, Fed.R.Civ.P., is expressly "subject to the provisions of Rule 23," LIU could be saddled with the responsibility of being the class representative for all the institutions. Either alternative would be unduly burdensome to the Court and to the involuntary defendant University: neither would advance the litigation.

In summary, class action certification of Spirt's suit for an injunction and declaratory judgment would be a formality. She is not an appropriate class representative for the assertion of claims for incidental money damages. Moreover, the presence of LIU as a necessary party with its unavoidable implication that class action status would mandate joinder of scores of other institutions argues forcefully against certification.

IV. *Conclusion*

For the foregoing reasons, the Court denies plaintiff's motion for class action certification as well as defendants' motion for partial summary judgment. Defendants' motion to join certain parties is denied as to the male participants in the pension program and granted as to the plaintiff's employer, LIU. The Court directs that LIU be joined as a party pursuant to Rule 19(a), Fed.R.Civ.P., and plaintiff is given 30 days from the date of this decision to file an amended complaint joining LIU as a party defendant.

It is so ordered.

Opinion of the District Court dated August 9, 1979 and Opinion on Reargument dated September 12, 1979

DIANA L. SPIRT,

Plaintiff,

—v.—

TEACHERS INSURANCE AND ANNUITY ASSOCIATION, COLLEGE RETIREMENT EQUITIES FUND, and LONG ISLAND UNIVERSITY,

Defendants.

No. 74 Civ. 1674

United States District Court,
Southern District of New York

August 9, 1979

On Motion for Reargument September 12, 1979

OPINION

WARD, *District Judge.*

This is an action alleging sex discrimination in the operation of certain retirement annuity programs administered by defendants Teachers Insurance and Annuity Association ("TIAA") and College Retirement Equities Fund ("CREF"). Plaintiff Diana L. Spirt ("Spirt"), a college professor who is required by her employer, defendant Long Island University ("LIU"), to participate in the TIAA and CREF plans, has moved for summary judgment, pursuant to Rule 56, Fed.R.Civ.P., alleging that the retirement annuity plans in question violate both the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* ("Title VII" or "the Act") and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Defendants TIAA and CREF have cross-moved for summary

judgment.[1] For the reasons hereinafter stated, Spirt's motion is granted in part and denied in part; TIAA and CREF's cross-motion is granted as to TIAA and denied as to CREF.

The parties have submitted a detailed Stipulation of Facts which indicates the following: TIAA is a non-profit, legal reserve life insurance company, organized in 1918 by the Carnegie Foundation for the Advancement of Teaching. It functions as a service organization, providing retirement and insurance plans for educational institutions and their staff members. Eligibility is limited to colleges, universities, independent schools, and certain other non-profit institutions that are engaged primarily in education or research. CREF is a companion non-profit corporation to TIAA with the same limited eligibility. The purpose of both TIAA and CREF is to offer educational institutions retirement and other benefit plans suited to the needs of their teaching staffs and other employees. The essential difference between the two corporations is that TIAA provides fixed dollar annuities, while CREF provides variable annuities.[2] Over 85 percent of all private four-year colleges and universities and over 40 percent of all public colleges and universities have adopted retirement plans managed by TIAA and CREF. In all, more than 450,000 employees of approximately 2,800 participating institutions are insured by the TIAA and CREF system.

LIU is one of the institutions which has adopted a retirement program for its employees managed by TIAA and CREF. Pursuant to a resolution of LIU's Board of Trustees, both the employee and the university contribute 5 percent of the first $4,800 of earnings; thereafter, the employee's contribution remains at 5 percent, and the institution contributes 11 per-

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1 Defendant LIU joins in neither motion. Rather, it "avers that it has always acted in good faith towards its male and female employees . . .," adopts a position of neutrality with respect to the issues before the Court, and "submits its rights and interests to the protection of [the] [C]ourt . . . ."

2 See footnote 4 *infra*.

cent. Participation in the plans by tenured professors at LIU, such as Spirt, is mandatory.

Plaintiff's claim of sex discrimination does not rest upon the contribution formula under the TIAA and CREF plans, which is identical for men and women. Rather, the asserted discrimination derives from TIAA and CREF's use of sex-segregated mortality tables in determining the benefits purchased with the contributions. These tables reflect the fact, that, taken as a group or class, women have a greater life expectancy than men. Based upon the uncontested rationale that women as a class will receive annuity payments for a longer period of time than men as a class, female participants in the plans receive smaller monthly payments than male participants of the same age, years in the plans, salary, and rate of contribution. Spirt contends that this discrimination violates Title VII and/or the Equal Protection Clause.

I. *Title VII*

A. The McCarran-Ferguson Act

TIAA and CREF first assert that application of Title VII to them in this case is barred by the McCarran-Ferguson Act ("the McCarran Act"), 15 U.S.C. § 1011 *et seq.*, which provides in pertinent part:

> No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance.

Id. § 1012(b).

The McCarran Act was passed in response to the Supreme Court's decision in *United States v. South-Eastern Underwriters Ass'n,* 322 U.S. 533, 64 S.Ct. 1162, 88 L.Ed. 1440 (1944), which, overruling *Paul v. Virginia,* 8 Wall. 168, 75 U.S. 168, 183, 19 L.Ed. 357 (1869), held that insurance transactions were subject to federal regulation under the Commerce Clause. The purpose of the statute was "broadly to give support to the

existing and future state systems for regulating and taxing the business of insurance . . . by removing obstructions which might be thought to flow from [congressional] power" and by declaring continued state regulation of the business of insurance to be in the public interest.[3] *Prudential Ins. Co. v. Benjamin,* 328 U.S. 408, 429-30, 66 S.Ct. 1142, 1155, 90 L.Ed. 1342 (1946); *Accord, SEC v. National Securities, Inc.,* 393 U.S. 453, 458, 89 S.Ct. 564, 21 L.Ed.2d 668 (1969). The effect of the legislation was to make federal statutes inapplicable to the business of insurance, returning to the states the plenary regulatory power they had enjoyed prior to the *South-Eastern Underwriters* decision, unless (1) federal legislation specifically related to the business of insurance; or (2) the challenged activity by the defendant did not constitute the business of insurance; or (3) the state had not enacted any law for the purpose of regulating the business of insurance which would be invalidated, impaired, or superseded by application of the federal law. *Group Life & Health Ins. Co. v. Royal Drug Co.,* 440 U.S. 205, 218, 99 S.Ct. 1067, 1076 & nn. 16, 18, 59 L.Ed.2d 261 (1979); *SEC v. National Securities, Inc., supra,* 393 U.S. at 458-61, 89 S.Ct. 564; *Prudential Ins. Co. v. Benjamin, supra,* 328 U.S. at 429-30, 66 S.Ct. 1142; *Cochran v. Paco,* 606 F.2d 460, 464 (5th Cir. 1979); *Hamilton Life Ins. Co. v. Republic Nat'l Life Ins. Co.,* 408 F.2d 606, 611 (2d Cir. 1969); *Monarch Life Ins. Co. v. Loyal Protective Life Ins. Co.,* 326 F.2d 841, 844 (2d Cir. 1963), *cert. denied,* 376 U.S. 952, 84 S.Ct. 968, 11 L.Ed.2d 971 (1964).

Federal legislation is deemed to "specifically relate to the business of insurance" within the meaning of the McCarran

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3 In this regard, the statute contains the following "declaration of policy":

> Congress declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

15 U.S.C. § 1011.

Act only if it contains an express indication to that effect. *Prudential Ins. Co. v. Benjamin, supra,* 328 U.S. at 429-30, 66 S.Ct. at 1155; *Cochran v. Paco, supra,* 606 F.2d at 464-465; *Hamilton Life Ins. Co. v. Republic Nat'l Life Ins. Co.,* 291 F.Supp. 225, 230 (S.D.N.Y.1968), *aff'd,* 408 F.2d 606, 611 (2d Cir. 1969); *Ben v. General Motors Acceptance Corp.,* 374 F.Supp. 1199, 1201 (D.Colo. 1974); *Gerlach v. Allstate Ins. Co.,* 338 F.Supp. 642, 649 (S.D.Fla. 1972). The federal statute relied on here, Title VII, is a law of general applicability to employers in commerce with no explicit reference to insurance. *Compare* § 514(a) of ERISA, 29 U.S.C. § 1144(a), *discussed in Hewlett-Packard Co. v. Barnes,* 571 F.2d 502 (9th Cir.), *cert. denied,* 439 U.S. 831, 99 S.Ct. 108, 58 L.Ed.2d 125 (1978). Thus, the supremacy of state regulation of the TIAA and CREF plans cannot be overridden on this basis.

The next consideration under McCarran Act analysis is whether the activities of defendants challenged by plaintiff constitute the "business of insurance." Although neither Congress nor the courts has defined the exact contours of the term, the general parameters were set by the Supreme Court in *SEC v. National Securities, Inc.,* 393 U.S. 453, 459-60, 89 S.Ct. 564, 569, 21 L.Ed.2d 668 (1969):

> Insurance companies may do many things which are subject to paramount federal regulation; only when they are engaged in the "business of insurance" does the statute apply. Certainly the fixing of rates is part of this business; that is what *South-Eastern Underwriters* was all about. The selling and advertising of policies, *FTC v. National Casualty Co.,* 357 U.S. 560, 78 S.Ct. 1260, 2 L.Ed.2d 1540 (1958), and the licensing of companies and their agents, cf. *Robertson v. California,* 328 U.S. 440, 66 S.Ct. 1160, 90 L.Ed. 1366 (1946), are also within the scope of the statute. Congress was concerned with the type of state regulation that centers around the contract of insurance, the transaction which *Paul v. Virginia* held was not "commerce." The relationship between insurer and insured, the type of policy which could be issued, its

> reliability, interpretation, and enforcement—these were the core of the "business of insurance." Undoubtedly, other activities of insurance companies relate so closely to their status as reliable insurers that they too must be placed in the same class. But whatever the exact scope of the statutory term, it is clear where the focus was—it was on the relationship between the insurance company and the policyholder. Statutes aimed at protecting or regulating this relationship, directly or indirectly, are laws regulating the "business of insurance."

The activity challenged in the instant case—the use of sex-segregated mortality tables in the computation of annuity benefits—is an integral part of the relationship between the insurance company and the policyholder and specifically centers on the type of policy which can be issued. As such, it would appear to fall squarely within the "business of insurance" as defined by *National Securities*.

However, the Supreme Court has also interpreted the word "insurance" under the McCarran Act to require some *investment* risk-taking on the part of the insurance company. *SEC v. Variable Annuity Co.*, 359 U.S. 65, 79 S.Ct. 618, 3 L.Ed.2d 640 (1959); *accord, Group Life & Health Ins. Co. v. Royal Drug Co., supra*, 99 S.Ct. at 1073-74. Thus, the Court has held that variable annuity companies, which assume only the risk of mortality but no investment risk[4] do not issue insurance within

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4 The Supreme Court has compared a variable annuity to the traditional fixed annuity as follows:

> While all the States regulate "annuities" under their "insurance" laws, traditionally and customarily they have been fixed annuities, offering the annuitant specified and definite amounts beginning with a certain year of his or her life. The standards for investment of funds underlying these annuities have been conservative. The variable annuity introduced two new features. First, premiums collected are invested to a greater degree in common stocks and other equities. Second, benefit payments vary with the success of the investment policy. The first variable annuity apparently appeared in this country about 1952 when New York created the College Retirement Equities Fund to provide annuities for teachers. It came into existence as a result of a search for a device that would

the meaning of the Act. *SEC v. Variable Annuity Co., supra,* 359 U.S. at 69-73, 79 S.Ct. 618. While TIAA offers fixed annuities which subject it to investment risk, CREF is a variable annuity company.[5] Under the rationale of *SEC v. Variable Annuity Co.*, therefore, it cannot be exempted from the dictates of Title VII as a result of state regulation of its policies. Consequently, the Court rejects this ground of CREF's motion for summary judgment.

Having met the first two conditions for supremacy of state regulation of the business of insurance, TIAA must still demonstrate that New York State has enacted a law for the purpose of regulating the business of insurance which would be invalidated, impaired, or superseded by the application of Title VII in the instant case. Plaintiff argues that New York State has

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> avoid paying annuitants in depreciated dollars. The theory was that returns from investments in common stocks would over the long run tend to compensate for the mounting inflation. The holder of a variable annuity cannot look forward to a fixed monthly or yearly amount in his advancing years. It may be greater or less, depending on the wisdom of the investment policy. In some respects the variable annuity has the characteristics of the fixed and conventional annuity: payments are made periodically; they continue until the annuitant's death or in case other options are chosen until the end of a fixed term or until the death of the last of two persons; payments are made both from principal and income; and the amounts vary according to age and sex of the annuitant. Moreover, actuarially both the fixed-dollar annuity and the variable annuity are calculated by identical principles. Each issuer assumes the risk of mortality from the moment the contract is issued. That risk is an actuarial prognostication that a certain number of annuitants will survive to specified ages. Even if a substantial number live beyond their predicted demise, the company issuing the annuity—whether it be fixed or variable—is obligated to make the annuity payments on the basis of the mortality prediction reflected in the contract. This is the mortality risk assumed both by [issuers of variable annuities] and by those who issue fixed annuities.

SEC v. Variable Annuity Co., supra, 359 U.S. at 69-70, 79 S.Ct. at 621, (footnotes omitted).

5 In fact, the Supreme Court in *SEC v. Variable Annuity, supra,* makes explicit reference to CREF as the provider of the first variable annuity plan in the United States. 359 U.S. at 69, 79 S.Ct. 618, *quoted* in footnote 4 *supra.*

not regulated the question before the Court. The McCarran Act does not specify the extent to which a state must have regulated the business of insurance before application of a federal statute will be deemed to "invalidate, impair, or supersede" state law. However, this language has been judicially construed as satisfied whenever the state has either occupied the field of regulating the business of insurance or else has regulated the same general subject within the business of insurance as that potentially affected by the federal statute. *See Lowe v. Aarco-American, Inc.*, 536 F.2d 1160, 1162 (7th Cir. 1976); *Cochran v. Paco, Inc.*, 409 F.Supp. 219, 222 (N.D. Ga.1975), *rev'd on other grounds*, 606 F.2d 460 (5th Cir. 1979); *Ben v. General Motors Acceptance Corp., supra*, 374 F.Supp. at 1201; *Gerlach v. Allstate Ins. Co., supra*, 338 F.Supp. at 649-50.[6] This interpretation is supported by the legislative intent that, except as otherwise expressly provided, plenary power to regulate the business of insurance rests in the states. *SEC v. National Securities, Inc., supra*, 393 U.S. at 459-60, 89 S.Ct. 564; *Prudential Ins. Co. v. Benjamin, supra*, 328 U.S. at 429-30, 66 S.Ct. 1142; *Cochran v. Paco, Inc., supra*, 606 F.2d at 462-464.

In the instant case, New York has occupied the field of regulating the business of insurance through one of the most comprehensive insurance codes in the country. It has also pervasively regulated the subject of discrimination between

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6 This interpretation parallels that accorded the antitrust proviso to the statute which states that the Sherman Act, the Clayton Act and the Federal Trade Commission Act "shall be applicable to the business of insurance to the extent that such business is not regulated by State law." 15 U.S.C. § 1012(b). *See FTC v. National Casualty Co.*, 357 U.S. 560, 564-65, 78 S.Ct. 1260, 2 L.Ed.2d 1540 (1958); *Crawford v. American Title Ins. Co.* 518 F.2d 217, 218-19 (5th Cir. 1975) (per curiam); *Commander Leasing Co. v. Transamerica Title Ins. Co.*, 477 F.2d 77, 83-84, 86 (10th Cir. 1973); *California League of Independent Ins. Producers v. Aetna Casualty & Surety Co.*, 175 F.Supp. 857, 860 (N.D.Cal.1959). Although cases construing the antitrust proviso are not dispositive of the issues presently before this Court, "they do serve as useful guides for construing the terms of the statute." *Cochran v. Paco, Inc., supra*, 606 F.2d at 463-464.

policyholders. For example, § 209 of the Insurance Law provides *inter alia* that no life insurance company doing business in the state shall make or permit any unfair discrimination between individuals of the same class and of equal expectation of life in premiums, rates, dividends or benefits of policies for life insurance or annuities. The restriction of § 209's proscription to discrimination between individuals of the same class evidences a legislative acceptance of discrimination between individuals based on their membership in classes or groups which, from an actuarial point of view, are known to present different insurance risks. Indeed, such risk classification is a concept fundamental to the operation of insurance systems. *The Supreme Court, 1977 Term*, 92 Harv.L.Rev. 57, 302 (1978); Note, *Sex Discrimination and Sex-Based Mortality Tables*, 53 B.U.L.Rev. 624, 625-26 & nn. 9-10, 627 n.18, 653-54 (1973). Since defendants' use of sex-segregated mortality tables is based on the demonstrated difference in longevity between men as a class and women as a class, it is the type of discrimination contemplated by New York's regulatory scheme. Consequently, application of Title VII to enjoin the use of such tables by TIAA would invalidate, impair, or supersede New York law.

Other provisions of the New York Insurance Law not only regulate the subject of discrimination between policyholders, but also evidence a legislative belief that discrimination on the basis of sex in the rates and benefits of annuity contracts is not unlawful. For example, implicit in §§ 159(1)(d) and 160(c), which refer to remedies for misstatements of age and sex in annuity contracts, is the notion that New York views sex as a permissible factor in setting annuity rates and benefits. The same conclusion is suggested by a comparison of § 40(10) with § 40-e. The former section contains a sweeping prohibition of discrimination in "any . . . manner whatsoever" on account of race, color, creed, or national origin. By contrast, sex discrimination is subject to a separate, limited prohibition in § 40-e, which makes it unlawful for an insurer to refuse to issue or to cancel or decline to renew a policy on account of the

sex of the applicant. *See January 28, 1975 Opinion and Report Pursuant to Section 278 of the Insurance Law; News Memorandum re Chapter 564, issued by the Executive Chamber of the State of New York, August 4, 1975.*

The Court is persuaded on the basis of this evidence that New York State has regulated the business of insurance, including the subject of discrimination between policyholders, in a pervasive manner and that, within that comprehensive system of regulation, discrimination on the basis of sex in computing rates and benefits is considered to be permissible. Consequently, application of Title VII to TIAA in the instant case would invalidate, impair, or supersede New York law regulating the business of insurance. Accordingly, the Court holds that application of Title VII to TIAA in this case is precluded by the McCarran Act.[7]

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7 Spirt's additional arguments as to the inapplicability of the McCarran Act border on the frivolous. The Court finds nothing in *SEC v. Variable Annuity Co., supra*, or *Group Life & Health Ins. Co. v. Royal Drug Co., supra*, which supports plaintiff's argument that the McCarran Act's immunity from federal legislation applies only to such state regulation as was in existence at the time of the grant. Moreover, the Supreme Court's statement in *Prudential Ins. Co. v. Benjamin, supra*, that "Congress' purpose was broadly to give support to the existing *and future* state systems for regulating and taxing the business of insurance," 328 U.S. at 429, 66 S.Ct. at 1155 (emphasis added), makes clear that Spirt's interpretation of the case law construing the statute is erroneous. In any event, the Court believes that New York's regulation of insurance at the time the McCarran Act became effective was such as to be invalidated, impaired, or superseded by application of Title VII herein. Sections 159, 160 and 209, for example, were enacted in 1939, six years prior to the passage of the McCarran Act.

Plaintiff has also argued that the McCarran Act is an antitrust exemption statute, and that other newly enacted federal statutes preempt state statutory regulation of insurance unless the federal statute provides otherwise. The Court finds nothing in *Insurers' Action Council, Inc. v. Heaton*, 423 F.Supp. 921 (D.Minn.1976), or *Lowe v. Aarco-American, Inc.*, 536 F.2d 1160 (7th Cir. 1976), cited by plaintiff or elsewhere which supports this view.

B. Title VII Procedural Prerequisites

TIAA[8] and CREF make the additional preliminary argument that plaintiff's Title VII claim must be dismissed because she has failed to comply with the statute's elaborate procedural requirements. Among the jurisdictional prerequisites to the maintenance of a civil action under Title VII is that the grievant have filed timely charges of employment discrimination with the Equal Employment Opportunity Commission ("EEOC") and received from that agency a statutory notice of the right to sue. 42 U.S.C. § 2000e-5(a), (e), (f); *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 798, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973); *Silver v. Mohasco Corp.,* 602 F.2d 1083, 1085-1086 (2d Cir. 1979); *Weise v. Syracuse University,* 522 F.2d 397, 412 (2d Cir. 1975). When the alleged unlawful employment practice occurs within a state having a law prohibiting such a practice, an aggrieved person must also preliminarily seek relief from the relevant state authority. The EEOC may not act upon the charge until 60 days after state proceedings have been commenced, unless state proceedings have been terminated earlier. 42 U.S.C. § 2000e-5(c); *Love v. Pullman Co.,* 404 U.S. 522, 524-25, 92 S.Ct. 616, 30 L.Ed.2d 679 (1972); *Silver v. Mohasco Corp., supra,* 602 F.2d at 1085-1086; *Weise v. Syracuse University, supra,* 522 F.2d at 411.

In the instant case, Spirt filed her complaint commencing this action on April 14, 1974, prior to filing charges with either the EEOC or the New York State Division of Human Rights ("NYSDHR"), the state agency responsible for complaints alleging discrimination in employment on the basis of sex.[9] On October 25, 1974, she submitted a charge to the EEOC. By letter dated November 6, 1974, the EEOC informed plaintiff that her complaint had been forwarded to the NYSDHR and

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8 Although the Court has held that the McCarran Act bars application of Title VII to TIAA, it has indicated throughout this opinion additional arguments made by that defendant, since TIAA has argued for summary judgment on behalf of CREF as well as on its own behalf.

9 The applicable statute is New York's Human Rights Law, Executive Law § 290 *et seq.* (McKinney 1972 & 1978 Supp.).

asked plaintiff to "contact [the state agency] immediately to be certain that all requirements for commencing proceeding in your case have been met." A week later, by letter dated November 13, 1974, a Supervisor at the NYSDHR wrote to Spirt, confirming that her charge had been referred to that agency by the EEOC. In the letter, the Supervisor indicated that he had tried unsuccessfully to call Spirt and her attorney and asked that Spirt call him since, before he could proceed, he needed answers to several questions posed by her charge to the EEOC. Nevertheless, allegedly due at first to substantial delays in receipt of the letter and then to the Supervisor's failure to return Spirt's attorney's calls, the sixty day deferral period expired without either Spirt or her attorney's ever establishing communication with the Supervisor at the NYSDHR. Once the deferral period had elapsed, Spirt's attorney, believing that the procedural requirements of the statute had been satisfied, made no further efforts to contact the state agency. The EEOC also believed the deferral requirement satisfied after 60 days and as of that time considered Spirt's charge to have been formally filed with it. When 180 days passed after the date of formal filing without a disposition of Spirt's charge by the EEOC, her attorney requested and received from that agency a Right to Sue letter, closing the EEOC file and entitling Spirt to maintain a lawsuit on the charge. Upon receipt of the Right to Sue letter, plaintiff proceeded with the instant action.

TIAA and CREF argue that the jurisdictional prerequisites to the maintenance of this action have not been satisfied because Spirt commenced this lawsuit without recourse to either the EEOC or the NYSDHR. Defendants assert that this action is also jurisdictionally defective because plaintiff's attorney's delayed response to the November 13, 1974 letter deprived the NYSDHR of a bona fide opportunity to consider and act upon her complaint.

The first of these arguments has already been rejected by this Court in a prior opinion. *Spirt v. TIAA*, 416 F.Supp. 1019, 1020 (S.D.N.Y.1976).[10] The recent decision by the United

10 This Court's conclusion recently received additional support in *Oscar Mayer & Co. v. Evans*, ___ U.S. ___, 99 S.Ct. 2066, 60 L.Ed.2d 609

States Supreme Court in *Oscar Mayer & Co. v. Evans*, ____ U.S. ____, 99 S.Ct. 2066, 60 L.Ed.2d 609 (1979), has made it clear beyond peradventure that defendants' second argument as to jurisdiction is also without merit. Indicating that the virtually identical language of § 14(b) of the Age Discrimination in Employment Act, 29 U.S.C. § 633(b) and § 706(b) of Title VII, 42 U.S.C. § 2000e-5(c), requiring a sixty-day period of deferral to state authorities were to be construed *in pari materia*, 99 S.Ct. at 2071, the Court interpreted the burden on the grievant under those sections as limited to the commencement of state proceedings by the filing of a written and signed statement of the facts upon which the proceeding is based. *Id.* at 2073-76. The Court recognized that such a statutory construction could conceivably permit grievants to avoid state intervention by failing to comply with state-imposed requirements, thereby frustrating the congressional intent that federal litigation be used as a last resort. *Id.* at 2075. Nevertheless, it interpreted the statutory language, which relates the proscription of further action only to the *commencement* of state proceedings[11] and which specifically excludes state-imposed requirements other than the filing of a

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(1979). There the Supreme Court ordered the federal district court to retain jurisdiction, holding the suit in abeyance, pending plaintiff's resort to the state agency. *Id.* 99 S.Ct. at 2076. The Court stated: "Suspension of proceedings is preferable to dismissal with leave to refile. . . .'To require a second "filing" by the aggrieved party after termination of state proceedings would serve no purpose other than the creation of an additional procedural technicality. Such technicalities are particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process.' *Love v. Pullman Co.*, 404 U.S. 522, 526-527, 92 S.Ct. 616, 30 L.Ed. 2d 679 (1972) . . . . For this reason, suspension pending deferral is the preferred practice in the federal courts." 99 S.Ct. at 2076 n. 13 (citations omitted).

11 Section 706(b) of Title VII, proscribes further action by the EEOC

> before the expiration of sixty days after proceedings have been *commenced* under the State or local law, unless such proceedings have been earlier terminated . . . .

42 U.S.C. § 2000e-5(c) (emphasis added).

written and signed statement of the facts from the definition of "commencement,"[12] as indicative of a congressional intent that the failure to meet additional state procedural requirements not foreclose federal relief. *Id.* at 2073. The Court also found this statutory construction supported by the legislative purpose of merely giving state agencies a limited opportunity to settle grievances in a voluntary manner on the local level. *Id.* at 2074. *See also Silver v. Mohasco Corp., supra,* 602 F.2d at 1083; *Voutsis v. Union Carbide Corp.*, 452 F.2d 889 (2d Cir. 1971), *cert. denied*, 406 U.S. 918, 92 S.Ct. 1768, 32 L.Ed.2d 117 (1972).

In the instant case, defendants do not dispute that plaintiff's charge with the EEOC, which included a copy of the complaint in this action, was referred to the NYSDHR by the EEOC, that the charge was received by that agency and that the EEOC deferred to the NYSDHR for 60 days. Regardless then of whether the NYSDHR had a sufficient opportunity to consider Spirt's grievance, it is clear under *Oscar Mayer* that the jurisdictional requirement of § 706(b) has been fulfilled.

C. The Merits

Turning to the substance of the Title VII claim, Spirt relies primarily[13] on § 703(a)(1) of the Act, 42 U.S.C. § 2000e-2(a)(1), which provides:

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12 Section 706(b) continues:

> If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority.

42 U.S.C. § 2000e-5(c).

13 Spirt also claims that she is entitled to summary judgment under § 703(a)(2) of Title VII, which makes it unlawful for an employer "to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment

> (a) It shall be an unlawful employment practice for an employer—
>
> > (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . .

This section was construed by the Supreme Court in the context of an employee pension plan providing different terms for men and women in *City of Los Angeles v. Manhart*, 435 U.S. 702, 98 S.Ct. 1370, 55 L.Ed.2d 657 (1978). *Manhart* struck down as violative of § 703(a)(1) an employer-operated pension fund which required women employees to contribute more than their male counterparts in order to receive equal periodic benefits upon retirement.

The Court found the plan unlawfully discriminatory although its differentiation in treatment was based upon the unquestionably accurate generalization that women as a class live longer than men as a class. Emphasizing that § 703(a)(1)'s proscription of discrimination with respect to compensation referred specifically to the "individual," the Court held that the section "precludes treatment of *individuals* as simply components of racial, religious, sexual or national class." 435 U.S. at 708, 98 S.Ct. at 1375. The Court recognized that unless women as a class made greater contributions to the plan, they would be subsidized by the class of male employees. However, it believed that the language of § 703(a)(1) evidenced Congress' judgment that fairness to individuals in matters of discrimination in employment covered by the statute were to take precedence over fairness to various classes affected thereby. *Id.* at 708-09, 98 S.Ct. 1370. It also found this construction consis-

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opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(2). However, inasmuch as the Court finds plaintiff's claim under § 703(a)(1) meritorious, it need not address this alternative basis for her Title VII action.

tent with the statutory goal of replacing "traditional assumptions about groups" with "thoughtful scrutiny of individuals," since a significant part of the longevity differential between men and women might well result from social factors rather than from innate biological characteristics. *Id.* at 709-10, 98 S.Ct. 1370. Finally, while recognizing that insurance is concerned with events that are individually unpredictable, the Court rejected the possibility that Congress intended a special definition of discrimination for employee group insurance plans. *Id.* at 710. The City of Los Angeles' plan was thus unlawful despite the validity of its general premise for the simple reason that many individual women would receive smaller paychecks than their corresponding male colleagues while working, but would live no longer than the men, thus receiving no compensating advantage during retirement.

The pension plans under attack in the instant case, like that involved in *Manhart*, differentiate in their treatment of women and men based on the fact that women participants as a class enjoy greater longevity than their male counterparts. However, because *individual* women will not live any longer than men who made the same contributions to the plans during their working years, but who receive larger monthly pension checks upon retirement, the program suffers from the same deficiency as the plan in *Manhart*.

TIAA and CREF maintain that *Manhart* does not control this case because here the differentiation in treatment of the sexes is in benefits, not in contributions. The Court, however, finds this distinction without significance. Section 703(a)(1) outlaws sex discrimination by employers with respect to "compensation." Justice Stevens' opinion for the majority in *Manhart* makes clear that both contributions and benefits constitute "compensation" within the meaning of the statute. 435 U.S. at 712 n. 23, 98 S.Ct. 1370. Thus, absent some affirmative justification, the discrimination against individual women in pension benefits involved in the instant case is as unlawful under § 703(a)(1) as the discrimination in contributions challenged in *Manhart*. Bernstein and Williams, *Sex Discrimination in Pensions: Manhart's Holding v. Manhart's*

Dictum, 78 Colum.L.Rev. 1241, 1242 (1978); *1977 Supreme Court, supra*, 92 Harv.L.Rev. at 309.

D. Definition of "Employer" Under Title VII

The present case is also distinguishable from *Manhart*, TIAA and CREF assert, because it involves a retirement system administered by private insurance companies, not by the employer alone. It is their position that they cannot be held to have violated Title VII because § 703(a) covers only employer-operated pension plans.

The Court agrees that in most instances pension plans of private insurers will not be subject to the dictates of Title VII, since § 703(a) makes unlawful only discriminatory employment practices of an "employer." However, the term "employer" under Title VII has been construed in a functional sense to encompass persons who are not employers in conventional terms, but who nevertheless control some aspect of an individual's compensation, terms, conditions, or privileges of employment. *See, e. g., Bailey Memorial Hospital v. Wilson*, 160 U.S.App.D.C. 14, 487 F.2d 1338 (1973); *Puntolillo v. New Hampshire Racing Comm'n*, 375 F.Supp. 1089 (D.N.H.1974); *Hairston v. McLean Trucking Co.*, 62 F.R.D. 642 (M.D. N.C.1974), *vacated on other grounds*, 520 F.2d 226 (4th Cir. 1975). *See also Manley v. Mobile County*, 441 F.Supp. 1351, 1355-56 (S.D.Ala.1977); *Curran v. Portland Superintending School Committee*, 435 F.Supp. 1063, 1072-73 (D.Me.1977).

Holding responsible those who control the aspects of employment accorded protection under Title VII is consistent with the congressional intent both that the Act's effectiveness not be frustrated by an employer's delegating authority for its employees' compensation, terms, conditions, or privileges of employment to third parties,[14] *see Manhart, supra*, 435 U.S. at 718 n. 33, 98 S.Ct. 1370, and that the Act be interpreted

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14 This intent is evident in § 701(b) of the Act, which defines employer under Title VII to include "any agent" of a covered employer. 42 U.S.C. § 2000e(b).

liberally in order to achieve its remedial purpose of eradicating discrimination in employment.[15] *See, e. g., Silver v. Mohasco Corp., supra,* 602 F.2d at 1087; *Craig v. Department of Health, Education & Welfare,* 581 F.2d 189, 193 (8th Cir. 1978); *Bell v. Brown,* 181 U.S.App.D.C. 226, 230, 557 F.2d 849, 853 (1977); *Puntolillo, supra,* 375 F.Supp. at 1091-92.

Although in the present case LIU is plaintiff's employer in the usual sense, Spirt contends that TIAA and CREF have been delegated authority with respect to her pension plan sufficient to require them to share LIU's responsibility as "employer" for purposes of § 703(a)(1). The Court agrees. Educational institutions such as LIU have delegated their responsibility for and control over employee annuity plans to TIAA and CREF. To hold that discrimination in that aspect of employee compensation cannot be fully remedied under Title VII because of such delegation would impair the effectiveness of the Act. It is significant in the Court's view that TIAA and CREF are non-profit corporations whose sole reason for existence is to serve Spirt's direct employer, LIU, and other similar institutions by relieving them of the burden of establishing and administering their own insurance programs for their employees and that participation in TIAA and CREF is compulsory for plaintiff as a tenured professor at LIU. Thus, the instant case is a far cry from the situation implicitly sanctioned by *Manhart,* 435 U.S. at 717-18, 98 S.Ct. 1370, in which an employer has set aside equal retirement contributions for each employee and let each retiree purchase the largest benefit which his or her accumulated contributions could command

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15 As the United States Court of Appeals for the District of Columbia has aptly stated:

> To permit [a third party] to exploit circumstances peculiarly affording it the capability of discriminatorily interfering with an individual's employment opportunities with another employer, while it could not do so with respect to employment in its own service, would be to condone continued use of the very criteria for employment that Congress has prohibited.

Sibley Memorial Hospital v. Wilson, supra, 160 U.S.App.D.C. at 17, 21, 488 F.2d at 1341.

from any private insurer on the open market. *EEOC v. Colby College,* 589 F.2d 1139, 1146 (1st Cir. 1978) (Coffin, C. J., concurring); *1977 Supreme Court, supra,* 92 Harv.L.Rev. at 309 n. 57. Under the circumstances of this case, the Court concludes that TIAA and CREF, as well as LIU, are employers within the meaning of Title VII and thus that CREF is liable along with the university[16] for any violation of § 703(a)(1).

E. Bennett Amendment

TIAA and CREF also claim that their annuity plans are not proscribed by Title VII by virtue of the Bennett Amendment, § 703(h) of the Act, 42 U.S.C. § 2000e-2(h). The Bennett Amendment provides that an employer's differentiation on the basis of sex in determining the wages or compensation paid to its employees will not violate Title VII if such differentiation is authorized by the Equal Pay Act, 29 U.S.C. § 206(d). The Equal Pay Act requires employers to pay men and women equal wages for equivalent work unless one of four specified exceptions is met. Defendants contend that the fourth exception, which authorizes a "differential based on any other factor other than sex," 29 U.S.C. § 206(d)(1)(iv), applies here

16 Neither LIU nor TIAA or CREF on its behalf has made the argument advanced by the defendant college in the analogous case of *EEOC v. Colby College,* 589 F.2d 1139 (1st Cir. 1978), that the educational institution cannot be charged with a violation of Title VII because TIAA and CREF contract directly with individual faculty members. In any event, this Court agrees with the First Circuit that the college's or university's involvement in the overall program is sufficient to hold it responsible under the Act: As the Court observed in *Colby College,* "[The educational institution] is more than a broker, or other intermediary, that enables the parties to enter into the arrangement." *Id.* at 1141. The institution's adoption of the TIAA and CREF plans " 'constitutes affirmative, active participation,' without which 'the challenged program could not operate.' [The institution] requires participation in the plan for all eligible employees and the amount of premium payments is determined under a formula established by [it]." *Id., quoting Spirt v. TIAA,* 416 F.Supp. 1019, 1021, 1022 (S.D.N.Y.1976). The institution also materially assists TIAA and CREF by collecting the employees' contributions through salary deductions and forwarding the contributions to the insurers.

because the difference in benefits provided to men and women is based on the factor of longevity rather than sex.

Although this argument was expressly rejected by the Supreme Court in *Manhart,* 435 U.S. at 711-14, 98 S.Ct. 1370, defendants assert that *Manhart* does not control the present case because the plan there involved unequal employee contributions and equal benefits while the opposite is involved here. They appear to base this argument on the fact that the Wage and Hour Administrator's regulation, 29 C.F.R. § 800.116, while silent on the permissibility of different employee contribution rates accompanied by equal benefits, such as the plan in *Manhart* involved, expressly provides that either equal employer contributions or equal benefits will satisfy the dictates of the Equal Pay Act. 29 C.F.R. § 800.116(d) (1978). However, Justice Stevens' opinion makes clear that even assuming that 29 C.F.R. § 800.116 could be interpreted as sanctioning unequal employee contributions when accompanied by equal benefits, the Court found a conflicting regulation of the Administrator, 29 C.F.R. § 800.151[17] more persuasive. 435 U.S. at 714 n. 26, 98 S.Ct. 1370; *see EEOC v. Colby College, supra,* 589 F.2d at 1144 n. 9.

Moreover, in light of *Manhart,* the Administrator has proposed that 29 C.F.R. § 800.116(d) be amended so as to require that both employee contributions and benefits be equal under the Equal Pay Act. 43 Fed.Reg. 38,029 (1978). The Court thus finds the asserted distinction between *Manhart* and the present case without significance. As in *Manhart,* the record contains no evidence that any factor other than the employee's sex was taken into account in calculating the differentials in benefits received by men and women. Therefore, as in *Manhart,* "one cannot 'say that an actuarial distinction based entirely on sex is "based on any other factor other than sex." Sex is exactly what it is based on.' " 435 U.S. at 712-13, 98 S.Ct. at 1377, 1378, *quoting Manhart v. City of Los Angeles,* 553 F.2d 581, 588

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17 That regulation condemns wage differentials based on the grouping of employees by sex for purposes of cost comparisons.

(1976). Accordingly, defendants have not established a defense based upon the Bennett Amendment.

F. Business Necessity

The Court is also unpersuaded by TIAA and CREF's argument that "business necessity" insulates them from what would otherwise be a Title VII violation. Assuming *arguendo* that the business necessity defense is applicable to practices which are facially discriminatory,[18] *but see 1977 Supreme Court,* 92 Harv.L.Rev. at 305 n. 37, the Court does not agree with TIAA and CREF that the sex distinctions drawn by them are "reasonably necessary to the normal operation" of their plans. *See Manhart, supra,* 435 U.S. at 716 n. 30, 98 S.Ct. 1370. Defendants emphasize that insurance deals with risks that cannot be evaluated for an individual, but which must be accurately predicted on a group basis to ensure financial reliability. The short answer to this argument is that the Court in *Manhart* made it clear that the impossibility of individual prediction could not justify resort to classifications proscribed by Title VII. *Id.* at 710, 98 S.Ct. 1370.

The insurance industry's reliance on the concept of equity also fails to legitimize the instant discrimination. In essence, TIAA and CREF contend that unless they are allowed to continue to use sex-segregated mortality tables, men will withdraw from defendants' programs and enroll in other plans which do not require them to assume more than their "actuarial share" of the annuity burden, resulting in TIAA and

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18 TIAA and CREF apparently ignore the fact that the instant case involves a practice that on its face discriminates against women in contending that plaintiff cannot establish a violation of Title VII because defendants did not intend to discriminate. Whatever argument can be made as to the necessity of proving intent to establish a prima facie violation of § 703(a)(1) when dealing with a facially neutral plan, *see Nashville Gas Co. v. Satty,* 434 U.S. 136, 144, 98 S.Ct. 347, 54 L.Ed.2d 356 (1977), it is established that no intent need be shown where, as here, the practice in question on its face discriminates against women. *See Manhart, supra,* 435 U.S. at 716, 98 S.Ct. 1370.

CREF's eventual insolvency. The Court finds no support for this dire prediction. Since, as in *Manhart,* participation in the plans is generally mandatory, "an employee who wants to leave the plans must also leave his job, and few workers will quit because one of their fringe benefits could theoretically be obtained at a marginally lower price on the open market."[19] 435 U.S. at 716 n.30, 98 S.Ct. at 1379 n.30. That male participants would even consider an adjustment in benefits sufficient to warrant a change in plans seems particularly unlikely in the case of TIAA and CREF because their plans offer attractive features not generally available on the open market such as portability between employers and immediate vesting. Bernstein & Williams, *Title VII and the Problem of Sex Classifications in Pension Programs,* 74 Colum.L.Rev. 1203, 1228, n. 94 (1974). The Court is also unconvinced that men would be likely to consider the equalization in treatment unfair: "The fundamental perception of equality with respect to compensation turns on the relative daily purchasing power of individual employees rather than the comparative actuarial estimates of a pension's total value. . . . After retirement, since the primary purpose of pensions is to ensure adequate cash flow to meet daily short term needs, the size of the monthly benefits would be the crucial element." *1977 Supreme Court, supra,* 92 Harv.L.Rev. at 305.

Moreover, contrary to TIAA and CREF's prediction, the result in this case will not "revolutionize the insurance and pension industries." *Manhart, supra,* 435 U.S. at 717, 98 S.Ct. at 1380. It is important to note that although CREF's activities fall within Title VII's jurisdiction in this case, private insurance companies are exempt from the dictates of the Act unless they are both functioning as employers within the meaning of the statute and are engaged in conduct which does not constitute the business of insurance under the McCarran Act. More-

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19 Whether men could in fact obtain insurance at a lower price on the open market is questionable. Because of economies of scale, an individual usually cannot purchase insurance as cheaply alone as he can as a member of a group. *1977 Supreme Court, supra,* 92 Harv.L.Rev. at 310.

over, the Court believes that the formulation of appropriate relief can avoid drastic changes in the legal rules governing the plans, which TIAA and CREF contend would jeopardize their solvency and the insureds' benefits. Furthermore, nothing in this decision precludes consideration of the composition of the work force as a whole in determining the cost of defendants' annuity plans, *see Manhart, supra,* 435 U.S. at 718, 98 S.Ct. 1370, or the use of other risk classifications not proscribed by Title VII to ensure reliability and equity.

For the foregoing reasons, the Court concludes that CREF and LIU have violated § 703(a)(1) of Title VII. Accordingly, Spirt's motion for summary judgment is granted as to these defendants, and TIAA and CREF's cross-motion for summary judgment is denied with respect to CREF.

II. *Equal Protection*

Since the Court has concluded that TIAA is exempt from the dictates of Title VII by virtue of the McCarran Act, it must consider Spirt's alternative argument that defendants' use of sex-segregated mortality tables in the computation of annuity benefits denies her her Fourteenth Amendment right to equal protection of the laws in violation of 42 U.S.C. § 1983 and § 1985(3). While TIAA and CREF assert that there can be no equal protection violation here because defendants are private parties, and there is no state action, plaintiff takes the position that there is sufficient state involvement to bring this case within § 1983. Plaintiff further contends that even if there is no state action, defendants' conduct is proscribed by § 1985(3), which outlaws purely private conspiracies to violate constitutional rights.

§ 1983

To state a claim for relief under § 1983, plaintiff must establish that defendants have deprived her of a right secured by the Constitution or laws of the United States and that, in so doing, defendants acted under color of state law.[20] *Flagg*

20 42 U.S.C. § 1983 provides:

Brothers, Inc. v. Brooks, 436 U.S. 149, 155, 98 S.Ct. 1729, 56 L.Ed.2d 185 (1978). The right relied on by Spirt is the Fourteenth Amendment guarantee of freedom from the denial by the state of the equal protection of the laws. Thus, Spirt must demonstrate both that defendants have acted under color of law and that their actions are properly attributable to the State of New York. *Id.* at 156, 98 S.Ct. 1729.

Although TIAA and CREF are private entities, Spirt alleges that their actions may be considered those of the state because, as insurance companies, their business involves substantial public interest and is the subject of substantial regulation by the State of New York. Plaintiff notes specifically that the New York Superintendent of Insurance is required to and does approve all TIAA contracts, CREF certificates and various other materials. The TIAA contracts as well as some of the other materials set forth the sex-segregated rate and mortality tables used by defendants to compute annuity benefits.

That a business is "affected with a public interest" does not suffice to convert its actions into those of the state for purposes of the Fourteenth Amendment. *Jackson v. Metropolitan Edison Co.,* 419 U.S. 345, 353-54 & n. 9, 95 S.Ct. 449, 42 L.Ed.2d 477 (1974); *see, e. g., Evans v. Newton,* 382 U.S. 296, 300, 86 S.Ct. 486, 15 L.Ed.2d 373 (1966); *Civil Rights Cases,* 109 U.S. 3, 8, 3 S.Ct. 18, 27 L.Ed. 835 (1883). Nor does the fact that the business is subject to extensive and detailed state regulation serve to transform its activities into governmental ones. *Jackson, supra,* 419 U.S. at 350, 95 S.Ct. 449; *Moose Lodge No. 107 v. Irvis,* 407 U.S. 163, 176-77, 92 S.Ct. 1965, 32 L.Ed.2d 627 (1972). Rather, "the inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of

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Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

the latter may be fairly treated as that of State itself." *Jackson, supra,* 419 U.S. at 351, 95 S.Ct. at 453; *accord, Moose Lodge, supra,* 407 U.S. at 176-77, 92 S.Ct. 1965.

In *Jackson*, the Supreme Court held that a state utility commission's approval of the defendant utility company's tariff which set forth the company's right to terminate service for nonpayment without a hearing did not transmute the utility's termination practice into state action "where the commission has not put its own weight on the side of the . . . practice by *ordering* it." 419 U.S. at 357, 95 S.Ct. at 456-457 (emphasis added). Subsequent to *Jackson*, in *Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149, 98 S.Ct. 1729, 56 L.Ed.2d 185 (1978), the Supreme Court unequivocally pronounced that the acts of a private entity will not be attributed to the state unless the state actually *compels* the action. There, the plaintiffs challenged the defendant storage company's sale of their property without a prior hearing. Although a state statute specifically authorized the sale by the defendant, the Court held there was no state action because the state was in no way responsible for the private defendant's action, action which the state statute permitted, but did not compel. 436 U.S. at 165, 98 S.Ct. 1729. In the present case, there can be no claim that the State of New York has compelled TIAA and CREF to use sex-segregated mortality tables. Therefore, under the rationale of *Jackson* and *Flagg Brothers*, there is no state action.

It is arguable, however, that *Flagg Brothers* and *Jackson* do not control the instant case. This Circuit has held that state action analysis requires consideration of the nature of the right allegedly infringed as well as the extent of the state's involvement, *e. g., Taylor v. Consolidated Edison Co.*, 552 F.2d 39, 42 (2d Cir.), *cert. denied*, 434 U.S. 845, 98 S.Ct. 147, 54 L.Ed.2d 111 (1977); *Weise v. Syracuse University, supra*, 522 F.2d at 405-06; *Jackson v. Statler Foundation*, 496 F.2d 623, 629 (2d Cir. 1973), *cert. denied*, 420 U.S. 927, 95 S.Ct. 9124, 43 L.Ed.2d 397 (1975), and that when the conduct complained of is race or sex discrimination, less state involvement may be required to find state action than when other interests are at stake. *Weise v. Syracuse University, supra*, 522 F.2d at 405-06;

Jackson v. Statler Foundation, supra, 496 F.2d at 629, 635. Because *Jackson* and *Flagg Brothers* involved deprivations of the right to procedural due process, not class-based discrimination, it is thus arguable[21] that in the present case conduct short of state compulsion could be deemed to constitute state action.

Even in the context of race discrimination[22] by a heavily regulated business, however, the Supreme Court in *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 92 S.Ct. 1965, 32 L.Ed.2d 627 (1972), made it clear that no state action will be

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21 Because the Court finds no state action in the present case even under a standard less stringent than that espoused in *Jackson* and *Flagg Brothers*, it need not decide whether such a less stringent standard actually governs the analysis herein. The Court notes, however, that it is at least questionable whether the Supreme Court would find *Jackson* and *Flagg Brothers* inapplicable to plaintiff's claim of sex discrimination, both because the high Court's decisions do not yet seem to have recognized that the degree of state involvement required to find state action is related to the right involved, *Jackson v. Metropolitan Edison Co., supra*, 419 U.S. at 373-74, 95 S.Ct. 449 (Marshall, J., dissenting), and because Justice Rehnquist's majority opinion in *Flagg Brothers* seems to rely on the race discrimination cases of *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970), and *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 92 S.Ct. 1965, 32 L.Ed.2d 627 (1972), to support the necessity of a state mandate to find state action. *See* 436 U.S. at 164-65, 98 S.Ct. 1729.

22 The Second Circuit has declined to decide whether sex discrimination should be equated to race discrimination for purposes of state action analysis, but has held that, like race discrimination, discrimination on account of sex requires less governmental involvement to find state action than was required in the college discipline cases of *Powe v. Miles*, 407 F.2d 73 (2d Cir. 1968), and *Grafton v. Brooklyn Law School*, 478 F.2d 1137 (2d Cir. 1973). *Weise v. Syracuse University*, 522 F.2d 397, 406 (2d Cir. 1975). The strict scrutiny afforded on the merits in cases involving equal protection challenges to race discrimination, *e. g., Bolling v. Sharpe*, 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884 (1954), as compared to the intermediate level of scrutiny which has apparently been adopted in cases involving sex discrimination, *e.g., Orr v. Orr*, 440 U.S. 268, 99 S.Ct. 1102, 59 L.Ed.2d 306 (1979); *Craig v. Boren*, 429 U.S. 190, 97 S.Ct. 451, 50 L.Ed.2d 397 (1977), would suggest that somewhat more governmental involvement would be required to find state action in sex discrimination cases than in race discrimination cases. However, as set forth *infra*, the Court finds inadequate state involvement to constitute state action even under the more permissive standards arguably applicable to allegations of race discrimination.

found unless, at a minimum, it can be said that the state has fostered or encouraged the alleged discrimination. 407 U.S. at 175-77 & n. 3, 92 S.Ct. 1965. In the present case, the New York Insurance Department plays absolutely no part in establishing or enforcing defendants' use of sex-segregated mortality tables. Nor is there any suggestion that the New York statutes and regulations governing insurance are intended overtly or covertly to foster or encourage discrimination against women. Although the Superintendent of Insurance approved defendants' contracts and certificates, such action in no way indicates encouragement for particular terms therein, but merely constitutes a determination that the contracts and certificates are not unlawful. *See Reichardt v. Payne*, 396 F.Supp. 1010, 1015-16 (N.D.Cal.1975). Such an exercise of a choice allowed by state law where the initiative comes solely from the private party and not from the state is insufficient to constitute state action. Accordingly, Spirt fails to state a claim under § 1983.

§ 1985

Plaintiff appears to place more stock in her argument that defendants have engaged in a conspiracy to deprive her of her Fourteenth Amendment right to equal protection that, even absent state action, is actionable under 42 U.S.C. § 1985(3).[23]

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23 42 U.S.C. § 1985(3) provides:

> If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws, or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one

This allegation is derived from *Griffin v. Breckenridge*, 403 U.S. 88, 91 S.Ct. 1790, 28 L.Ed.2d 338 (1971), in which the Supreme Court held that certain wholly private conspiracies to deprive persons of equal protection of the laws or equal privileges and immunities under the laws may be redressed under § 1985(3) if accompanied by "some racial. or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." *Id.* at 101-02, 91 S.Ct. at 1798.

Griffin upheld a remedy under § 1985(3) for black citizens assaulted in the course of interstate travel on a public highway on the basis of section 2 of the Thirteenth Amendment which granted Congress the authority to create "a statutory cause of action for Negro citizens who have been the victims of conspiratorial, racially discriminatory private action" intended to deprive them of their basic rights. *Id.* at 105, 91 S.Ct. at 1800. The Court based its holding alternatively on the right to interstate travel, a right and privilege of national citizenship assertable against private as well as state interference. *Id.* at 105-06, 91 S.Ct. 1790, *citing Shapiro v. Thompson*, 394 U.S. 618, 629-31, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969); *id.* at 642-44, 89 S.Ct. at 1335-1336 (concurring opinion); *United States v. Guest*, 383 U.S. 745, 757-60 & n. 17, 86 S.Ct. 1170, 16 L.Ed.2d 239 (1966); *Twining v. New Jersey*, 211 U.S. 78, 97, 29 S.Ct. 14, 53 L.Ed. 97 (1908); *Slaughter-House Cases*, 16 Wall. 36, 83 U.S. 36, 79-80, 21 L.Ed. 394 (1873); *Crandall v. Nevada*, 6 Wall. 35, 73 U.S. 35, 44, 48-49, 18 L.Ed. 744 (1868); *Passenger Cases*, 7 Haw. 283, 48 U.S. 283, 492, 12 L.Ed. 702 (1849) (Taney, C. J., dissenting).

In the instant case, Spirt does not allege a conspiracy to deprive her of her rights under the Thirteenth Amendment or her right to interstate travel. Rather she claims to be the victim

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or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

of a sex-based conspiracy[24] to deprive her of the right to equal protection of the laws under the Fourteenth Amendment. Whether § 1985(3) extends the Fourteenth Amendment's protections to private action is an issue left open by the Supreme Court in *Griffin*, 403 U.S. at 107, 91 S.Ct. 1790, and which has since divided the lower courts.[25] However, the question appears to have been recently resolved in *Great American Federal Savings & Loan Ass'n v. Novotny*, ___ U.S. ___, 99 S.Ct. 2345, 60 L.Ed.2d 957 (1979). There the Supreme Court clearly stated that § 1985(3) creates no substantive rights, but is rather "a purely remedial statute, providing a civil cause of action when some otherwise defined federal right . . . is breached by a conspiracy in the manner defined by the section." 99 S.Ct. at 2349, 2351. By contrast to the right under the Thirteenth Amendment to be free from the incidents of slavery and the right to interstate travel, the federal right to equal protection under the Fourteenth Amendment relied on by plaintiff affords protection only against unequal treatment by the state. *Jackson v. Metropolitan Edison Co., supra*, 419 U.S.

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24 This Circuit has not reached the issue whether sex-based conspiracies have the requisite "class-based, invidiously discriminatory animus" demanded by *Griffin*. *Weise v. Syracuse University*, 522 F.2d 397, 408-09 n. 16 (2d Cir. 1975). However, the Third Circuit, in a persuasive opinion, has held that they do *Novotny v. Great American Federal Savings & Loan Ass'n*, 584 F.2d 1235, 1243-44 & n. 36 (3d Cir. 1978) (en banc), *rev'd on other grounds*, ___ U.S. ___, 99 S.Ct. 2345, 60 L.Ed.2d 957 (1979); *accord, Conroy v. Conroy*, 575 F.2d 175, 177 (8th Cir. 1978).

25 *Compare Bellamy v. Mason's Stores, Inc.*, 508 F.2d 504 (4th Cir. 1974) (state action required); *Dombrowski v. Dowling*, 459 F.2d 190 (7th Cir. 1972) (same); *and Weiss v. Willow Tree Civic Ass'n*, 467 F.Supp. 803 (S.D.N.Y. 1979) (same), *with Action v. Gannon*, 450 F.2d 1227 (8th Cir. 1971) (state action not required). *See also Weise v. Syracuse University, supra*, 522 F.2d at 401, 408 (error to dismiss for lack of state action § 1985(3) claim alleging conspiracy to deprive plaintiffs of equal protection of the laws); Frantz, *Congressional Power to Enforce the Fourteenth Amendment against Private Acts*, 73 Yale L.J. 1353 (1964); Note, *Federal Power to Regulate Private Discriminations: The Revival of the Reconstruction Era Amendments*, 74 Colum.L.Rev. 451, 516-17 (1974).

at 349, 95 S.Ct. 449; *Moose Lodge No. 107 v. Irvis, supra*, 407 U.S. at 172, 92 S.Ct. 1965; *Shelley v. Kraemer*, 334 U.S. 1, 13, 68 S.Ct. 836, 92 L.Ed. 1161 (1948); *see United Steelworkers of America v. Weber*, ___ U.S. ___, ___, 99 S.Ct. 2721, 61 L.Ed.2d 400 (1979). Thus, state action is an essential element of a § 1985(3) claim premised thereon. As Justice Stevens stated in his concurring opinion in *Novotny:*

> Some privileges and immunities of citizenship, such as the right to engage in interstate travel and the right to be free of the badges of slavery, are protected by the Constitution against interference by private action, as well as impairment by state action. Private conspiracies to deprive individuals of these rights are, as this Court held in *Griffin v. Breckenridge*, 403 U.S. 88, 91 S.Ct. 1790, 29 L.Ed.2d 338, actionable under § 1985(c) without regard to any state involvement.
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> Other privileges and immunities of citizenship such as the right to due process of law and the right to the equal protection of the laws are protected by the Constitution only against state action. *Shelley v. Kraemer*, 334 U.S. 1, 13, 68 S.Ct. 836, 842, 92 L.Ed. 1161. If a state agency arbitrarily refuses to serve a class of persons—Chinese Americans, for example, see *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220—it violates the Fourteenth Amendment. Or if private persons take conspiratorial action that prevents or hinders the constituted authorities of any State from giving or securing equal treatment, the private persons would cause those authorities to violate the Fourteenth Amendment; the private persons would then have violated § 1985(c).
>
> If, however, private persons engage in purely private acts of discrimination—for example, if they discriminate against women or against lawyers with a criminal practice, see *Dombrowski v. Dowling*, 459 F.2d 190, 194-196—they do not violate the Equal Protection Clause of the Fourteenth Amendment. The rights secured by the Equal Protection and Due Process Clauses of the Four-

> teenth Amendment are rights to protection against unequal or unfair treatment of the State, not by private parties. Thus, while § 1985(c) does not require that a defendant act under color of state law, there still can be no claim for relief based on a violation of the Fourteenth Amendment if there has been no involvement by the State. The requirement of state action, in this context, is no more than a requirement that there be a constitutional violation.

Id. 99 S.Ct. at 2354-55 (Stevens, J., concurring) (footnotes omitted).

In the present case, the Court has held that there is no state action. Consequently, Spirt cannot state a claim under 42 U.S.C. § 1985(3). Inasmuch as plaintiff has not established either a Title VII or Equal Protection violation by TIAA, her motion for summary judgment is denied as to that defendant. TIAA's cross-motion for summary judgment is granted.

III. *Relief*

The Court faces the task of framing a remedy that will eliminate CREF and LIU's unlawful discrimination against plaintiff while at the same time safeguarding the legal and equitable rights of others potentially affected by a decree and minimizing the financial dangers which could result from the restructuring of a major retirement program.

The Court's task is eased by the fact that Spirt is a "deferred annuitant," who nas not yet begun to receive annuity benefits. The sex-based mortality tables which result in the instant violations of Title VII are not used by CREF until the date of retirement. Prior to that time, premium payments to CREF purchase "accumulation units," each unit representing a small share of participation in every investment in the CREF portfolio. The number of accumulation units purchased with each monthly payment varies depending on the current value of CREF's accumulation fund and the total number of accumulation units outstanding among all participants. At retirement, a participant's total accumulation units are converted into a

fixed number of "annuity units." The number of annuity units received is based essentially on the number of accumulation units owned by the participant, the type of annuity selected, and the life expectancy of the annuitant(s) calculated according to the mortality tables used by CREF. Under present practice, if a male and a female participant of the same age retire with the same number of accumulation units and they choose, for example, the same single life annuity, the woman will be allocated a smaller number of annuity units than the man (leading to smaller monthly benefits) because her life expectancy is deemed greater.

Because the number of annuity units to which Spirt is entitled has not yet been calculated, the Court believes that her rights can be adequately protected by the issuance of purely prospective relief. It therefore enjoins CREF from using sex-based mortality tables[26] in calculating the number of annuity units to which plaintiff and its other deferred annuitants are entitled.[27] The Court further enjoins LIU from both making contributions on behalf of its employees and from requiring its employees to contribute to any retirement plan that uses sex-based mortality tables in calculating periodic benefits.

The above remedy avoids the necessity of any retroactive payments or other increase in costs that might jeopardize the financial stability of the TIAA and CREF plans. *See generally*

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26 The Court includes within the term "sex-based mortality tables" mortality tables which use sex as one of the several demarcating factors in determining longevity. Although one commentator has suggested that Justice Stevens' opinion in *Manhart* is unclear as to whether such tables would pass muster under Title VII, *1977 Supreme Court, supra*, 92 Harv.L.Rev. at 310, the Court believes that any determination of rates or benefits based on such tables would also be unlawful as it would still result in discrimination between men and women who were alike in all relevant characteristics except sex. *See id.* at 310 & n. 61.

27 Although plaintiff's motion for class certification was denied by this Court, the decision was predicated in part on TIAA and CREF's acknowledgment that any relief would of necessity be class-oriented. 416 F.Supp. 1019, 1023-25 (S.D.N.Y.1976).

Manhart, supra, 435 U.S. at 718-23, 98 S.Ct. 1370; *Colby College, supra*, 589 F.2d at 1144-46. Moreover, since the only participants who need be affected are deferred annuitants such as Spirt, the relief ordered by the Court should also avoid any possible question of impairment of the contract rights of male participants,[28] *see Colby College, supra*, 589 F.2d at 1145, or violation of the Equal Pay Act.[29]

Compliance with the Court's decree may only require new mathematical computations based on currently available statistics. The Court is mindful, however, of the Supreme Court's admonition in *Manhart* as to "the difficulty of amending a major pension plan, a task that cannot be accomplished overnight." 435 U.S. at 719 n. 36, 98 S.Ct. at 1381 n. 36. It

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28 The CREF certificates do not promise that any particular mortality tables will be used in the calculation of the annuity units to which a participant is entitled. To the extent TIAA may choose voluntarily to abandon its use of sex-segregated mortality tables in order to qualify as a retirement plan that may be used by LIU, it too may do so without impairing the contract rights of male participants. Although the TIAA contracts provide that premiums will be applied to purchase annuities according to a rate schedule that currently incorporates sex-based mortality tables, the contracts also provide that TIAA may at any time substitute a new rate schedule applicable to subsequent premiums.

29 As previously noted, the Equal Pay Act forbids employers subject to its terms from paying men and women unequal wages for equivalent work. However, the statute specifically provides "[t]hat an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee." 29 U.S.C. § 206(d)(1). Based on this proviso, TIAA and CREF have contended that any relief which lowered the benefits of male participants would "reduce the wage rate of any employee" in violation of the Equal Pay Act. While the Court need not determine the validity of this argument in view of the relief ordered herein, it notes that defendants appear to presume without authority that the proviso is applicable to relief formulated to obtain compliance with Title VII as opposed to the Equal Pay Act. It also notes that whether retirement benefits are "wages" within the meaning of the Equal Pay Act is an open question which the Supreme Court has declined to resolve. *See Manhart, supra*, 435 U.S. at 712 n. 23, 98 S.Ct. 1370. *See also* Bernstein & Williams, *Title VII and the Problem of Sex Classifications in Pension Programs*, 74 Colum.L.Rev. 1203, 1225-26 (1974).

therefore stays enforcement of its decree until the termination of the 1979-80 academic year: CREF is directed to comply with the Court's order with regard to the computation of annuity units for all participants retiring on or after May 1, 1980; LIU is directed to comply with the Court's order with regard to all employment contracts becoming effective on or after June 1, 1980.

Settle order on notice.

OPINION ON MOTION FOR REARGUMENT

Defendant College Retirement Equities Fund ("CREF") moves for reargument pursuant to Rule 9(m) of the General Rules of this Court, claiming that there is an apparently inadvertent inconsistency between the stated purpose of the remedy set forth in the Court's Opinion dated August 9, 1979 ("the Opinion") and the actual effect of the relief granted. Specifically, CREF contends that the Court's order enjoining it from using sex-segregated mortality tables in the computation of retirement benefits ought to apply only to the calculation of annuity units based on contributions made starting May 1, 1980, rather than to all annuity units computed on or after that date. Otherwise, according to CREF, the remedy provided will, in contravention of the Court's stated purpose, have a retroactive impact and result in the violation of the legal and equitable rights of male deferred annuitants. Although the effect of the remedy granted was by no means inadvertent[1] and the Court hereby reaffirms its Opinion, it will nevertheless briefly indicate why it believes there is no inconsistency between its intended purpose and the relief ordered.

The Court's intention to avoid retroactive relief was based on the Supreme Court's cautioning in *Manhart* that the rules

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1 The Court finds CREF's suggestion that the Court reached its result inadvertently to be somewhat disingenuous inasmuch as CREF's argument concerning the effect of the relief granted by the Court is based primarily not on the sea of documents submitted to the Court on defendants' initiative, but rather on supplementary submissions *made at the request of the Court* shortly before its Opinion was filed.

applicable to pension funds found to have violated Title VII in good faith should generally not be applied retroactively, since requiring pension plans to make retroactive payments could jeopardize the insurer's solvency and ultimately the insureds' benefits. *City of Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702, 720-22, 98 S.Ct. 1370, 55 L.Ed.2d 657 (1978). However, in contrast to *Manhart*, where the lower courts had awarded payments to the entire class of female employees and retirees of the difference between male participants' past contributions to the pension fund and their own, *id.* at 718, 719 n.36, 98 S.Ct. 1370, the relief granted in the instant case will not involve any unanticipated payments by CREF which would force it to meet unchanged obligations with diminished assets. Rather, the relief granted in this case will merely vary the future allocation and distribution of an unaffected amount of assets. For this reason, the Court believes that the remedy it has fashioned does not involve impermissible retroactive relief within the meaning of *Manhart*.[2]

The Court also disagrees with CREF that the remedy it has ordered must be amended to avoid either a breach of contract or violation of the equitable rights of male deferred annuitants. CREF now for the first time points to four documents which it contends give deferred annuitants a contractual right, which CREF will have to breach to comply with this Court's order, to have the number of annuity units they will be awarded at the time of retirement calculated pursuant to an actuarial formula that will take into account their sex.[3] The

2 Retroactive relief within the meaning of *Manhart* would, in the Court's view, have been a relevant issue if this case had involved the rights not only of deferred annuitants such as Diana Spirt, but also of female retirees who had already received annuity checks smaller than those of their male counterparts and who sought to recover a money award for the difference in benefits heretofore provided.

3 Only one of these documents, the Report of Annuity Premiums and Benefits, was submitted by CREF in support of its and TIAA's motion and in opposition to plaintiff's cross-motion for summary judgment. Two of the remaining documents now relied on by CREF, the CREF certificate and the

Court, however, is not persuaded that any of these documents creates a contractual obligation by CREF to use sex-segregated mortality tables in computing benefits.[4] Moreover, even assuming such a promise by CREF, the fact of the matter is that this Court has held the computation of CREF benefits based on sex-segregated tables to be unlawful and has enjoined their use. Therefore, any possible action against CREF for breach of contract should be barred by the doctrine of impossibility of performance.[5] J. Calamari & J. Perillo, *Contracts* § 13-4, at 486-87 (2d ed. 1977).

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information pamphlet *CREF Units at Work*, were thereafter supplied to the Court only at its specific request. The fourth document, a single page from the pamphlet describing CREF's Rules for Determining Benefits, has been submitted to the Court for the first time in connection with the instant motion for reargument. While the Court finds nothing on this page persuasive, it could not, in any event, accept an argument based on a single page from this pamphlet, which clearly begins in the middle of one section and which appears to end in the middle of another. Furthermore, § 12 of the CREF certificate puts an end to any breach of contract argument premised on these Rules by providing that Rules "may [be] amend[ed] and add[ed] to . . . from time to time . . . ."

4 Of these four documents, the only one which the Court deems worthy of discussion is the CREF certificate. Although the certificate does state generally in § 7 that the number of annuity units on the Annuity Starting Date will depend on listed factors, including "the age and sex of the Participant, and in the case of a Survivor Unit-annuity, the age and sex of the Participant's spouse," in marked contrast to the TIAA contract it does not set forth a sex-segregated rate schedule or otherwise indicate in any way how the participant's sex will affect the benefits provided. Under all the circumstances, the Court does not believe that this general reference to sex as a factor in computing benefits can be reasonably interpreted as a promise on the part of CREF to accord an advantage in benefits to male participants based on the greater longevity of men as a class over women as a class.

5 CREF has argued that because the relief ordered by the Court would *inter alia* breach the contractual rights of male deferred annuitants, the remedy must be modified so as to limit the injunction against the use of sex-segregated mortality tables to the computation of annuity units based on contributions made to the plan starting May 1, 1980. If, however, as CREF has argued, it is already contractually committed to calculate annuity units according to sex-segregated mortality tables, the Court does not understand

Furthermore, the Court does not believe that its decree results in the inequitable treatment of male deferred annuitants. For the reasons set forth on page ____ of its Opinion, the Court simply does not credit CREF's argument that male participants have been induced to make contributions they otherwise would not have made to CREF based on the now-frustrated expectation that their sex would be taken into account in determining their future benefits. The unlikelihood of any such reliance is confirmed by a consideration of the general nature of participation in CREF which, unlike TIAA, involves assumption of risks by the participant, who knows that the benefits purchased by current contributions will be determined in the future based on a variety of variable factors, including possibly changed actuarial standards, which may leave him or her in a better or worse position than would be the case if the benefits were purchased immediately. Under all the circumstances, the Court cannot conclude that male deferred annuitants could have reasonably relied on CREF's use of sex-segregated mortality tables in computing their benefits to a degree that would justify prolonging the unlawful discrimination against female deferred annuitants found in this case.

The Court is also unpersuaded that the relief it has ordered contravenes the New York Insurance Law. CREF asserts that the New York statute contemplates that the difference in male and female life expectancies will be considered in computing individual annuity rates. However, as discussed at pages 1303-1304 and 1312-1313 of the Court's opinion, the New York Insurance Law does not require the use of sex-segregated tables, but merely finds their use to be permissible.[6]

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how banning the use of the subject tables with regard to benefits based on future contributions would avoid a breach of contract if enjoining their use as to benefits computed from past contributions would not.

6 Furthermore, even if the New York Insurance Law were inconsistent with the relief ordered by this Court to bring CREF into compliance with Title VII, such relief would still be permissible in view of the inapplicability of the McCarran-Ferguson Act to CREF in this case. *See generally* Opinion at 1301-1303.

Accordingly, for the foregoing reasons, defendant CREF's motion for reargument is denied.

It is so ordered.

Opinion of the District Court dated March 19, 1982

DIANA L. SPIRT, individually and on behalf of all others similarly situated,

Plaintiff,

—and—

AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS and EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Applicants for Intervention,

—against—

TEACHERS INSURANCE AND ANNUITY ASSOCIATION, COLLEGE RETIREMENT EQUITIES FUND, and LONG ISLAND UNIVERSITY,

Defendants,

—and—

ALBERT B. LEWIS, Superintendent of Insurance, Insurance Department, State of New York,

Supplemental Defendant.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

—and—

DEBORAH MOSHOWITZ, SUSAN ALEXION, RENATA CLYNES, individually and on behalf of all others similarly situated, AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, and AMERICAN NURSES' ASSOCIATION,

Applicants for Intervention,

—against—

ALBERT B. LEWIS, individually and as Superintendent of Insurance, Insurance Department, State of New York, TEACHERS INSURANCE AND ANNUITY ASSOCIATION, COLLEGE RETIREMENT EQUITIES FUND, LONG ISLAND UNIVERSITY, and DIANA L. SPIRT,

Defendants.

Nos. 74 Civ. 1674, 81 Civ. 881

United States District Court,
Southern District of New York

March 19, 1982

WARD, J.

BACKGROUND

The above-captioned actions both allege sex discrimination in the operation of certain retirement annuity plans administered by the Teachers Insurance and Annuity Association ("TIAA") and the College Retirement Equities Fund ("CREF"). Plaintiff in 74 Civ. 1674(RJW) (hereinafter "the *Spirt* action") is Diana L. Spirt, a professor at Long Island University ("LIU"). Spirt is required, as a condition of her employment by LIU, to participate in the TIAA and CREF retirement plans. Plaintiff in 81 Civ. 881(RJW) (hereinafter "the *Lewis* action") is the Equal Employment Opportunity Commission (the "EEOC"). TIAA, CREF, and LIU are named as defendants in the *Spirt* action. Albert B. Lewis, Superintendent of the New York State Department of Insurance ("Superintendent Lewis"), is the principal defendant in the *Lewis* action and is named as a supplemental defendant in the *Spirt* action. TIAA, CREF, LIU, and Spirt, plaintiff in the *Spirt* action, are named as defendants in the *Lewis* action on the theory that they have an interest in the outcome of the *Lewis*

action such that their joinder is required by Rule 19(a)(2), Fed. R. Civ. P.

The *Spirt* action has been the subject of three prior decisions of the Court. In an opinion filed on July 1, 1976 ("*Spirt I*"), the Court denied Spirt's motion for class certification, denied the joint motion of TIAA and CREF for partial summary judgment, and granted a TIAA-CREF motion to join LIU as a defendant. *See* 416 F. Supp. 1019. The Court filed a second opinion on August 9, 1979 ("*Spirt II*"), whereby Spirt's motion for summary judgment was granted in part and denied in part, TIAA's cross-motion for summary judgment was granted, and CREF's cross-motion for summary judgment was denied. *See* 475 F. Supp. 1298. In a third opinion, this one filed on September 12, 1979 ("*Spirt III*"), the Court denied CREF's motion for reargument of the decision rendered by the Court in *Spirt II*. *See* 475 F. Supp. 1316.

The Court assumes familiarity with its prior decisions in the *Spirt* action. In order to explain the present posture of the two actions that are the subjects of today's opinion, however, the Court must describe certain events that occurred after September 12, 1979, the date of *Spirt III*. On September 18, 1979, the Court entered a final judgment ("the *Spirt* judgment") based on its previous opinions in the *Spirt* action. Notices of appeal from this judgment were filed by TIAA and CREF on October 11, 1979, by LIU on October 12, 1979, and by Spirt on October 18, 1979. On January 8, 1980, the Court of Appeals, pursuant to a stipulation among the parties, ordered that the appeals be withdrawn from active consideration in order that this Court could supervise the settlement negotiations in which the parties were then engaging. Under this order, the Court of Appeals retained jurisdiction over the *Spirt* action.

In the course of the settlement negotiations, TIAA and CREF proposed to adopt tables that would eliminate sex-based differentiation in the benefits received by participants in the TIAA and CREF retirement plans on account of their *future* contributions to these plans. In December 1979, TIAA and CREF submitted a set of such "merged-gender mortality tables" ("Unisex I") to Superintendent Lewis for approval.

Superintendent Lewis approved Unisex I in February 1980. However, the EEOC informed TIAA and CREF that, for several reasons, it viewed Unisex I to violate both Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. §§ 2000e–2000e-17, and the Equal Pay Act of 1963 ("the Equal Pay Act"), 29 U.S.C. § 206(d).

Thereafter, TIAA, CREF, and the EEOC agreed to modify Unisex I in certain respects. On November 5, 1980, the EEOC issued an opinion letter stating that the revised tables ("Unisex II") would not, if adopted, violate Title VII or the Equal Pay Act. TIAA and CREF then submitted Unisex II to Superintendent Lewis for approval. In letters dated January 27, 1981, and February 5, 1981, Superintendent Lewis rejected Unisex II as to TIAA and CREF, respectively, on the ground that adoption of Unisex II would violate the New York Insurance Law.

TIAA and CREF then developed an entirely new plan with respect to future contributions ("Unisex III"), which plan also used merged-gender mortality tables. Unisex III was submitted to Superintendent Lewis for approval. On July 20, 1981, Superintendent Lewis approved Unisex III. However, the EEOC informed TIAA and CREF that it viewed Unisex III to be violative of both Title VII and the Equal Pay Act.

Meanwhile, on February 19, 1981, the Court of Appeals, pursuant to a stipulation among the parties, had ordered that the *Spirt* action be remanded to this Court for two purposes: (1) to permit TIAA and CREF to raise a particular Title VII defense, known as the "good-faith reliance defense," that they had not previously argued to this Court, and (2) to permit Spirt to seek leave to join Superintendent Lewis as a party in the *Spirt* action so that this Court might consider issues raised by Superintendent Lewis' refusal to approve Unisex II. In an order dated February 23, 1981, this Court, pursuant to another stipulation among the parties, granted Spirt leave to serve and file a supplemental complaint naming Superintendent Lewis as a defendant. These facially innocuous events caused a flood of motion papers to descend upon the Court over a period of some eight months, the total volume of which has been

duplicated by few, if any, of the hundreds of cases heard by this member of the Court during his ten years on the bench.

Spirt filed her supplemental complaint on February 23, 1981. On February 24, 1981, Spirt filed a motion, pursuant to Rule 56, Fed. R. Civ. P., for summary judgment against Superintendent Lewis. TIAA and CREF cross-moved, pursuant to Rule 12(b)(6), Fed. R. Civ. P., for an order dismissing the supplemental complaint. Superintendent Lewis filed a memorandum with the Court wherein he opposed Spirt's motion for summary judgment and joined in the TIAA-CREF motion to dismiss. On March 30, 1981, TIAA and CREF moved, pursuant to Rule 60(b), Fed. R. Civ. P., for an order partially relieving CREF from the *Spirt* judgment. The latter TIAA-CREF motion is based on the "good-faith reliance defense" noted earlier. Spirt filed opposition to the TIAA-CREF cross-motion to dismiss her supplemental complaint, but has not filed opposition to the TIAA-CREF motion for partial relief from the *Spirt* judgment.

By this time, the new developments in the *Spirt* action had caught the attention of a number of persons and entities not parties in that litigation. On February 13, 1981, the EEOC filed the complaint in the *Lewis* action. An amended complaint was filed on March 13, 1981. The *Lewis* action seeks to enjoin Superintendent Lewis from applying the New York Insurance Law in a manner that the EEOC contends conflicts with the United States Constitution, Title VII, and the Equal Pay Act. Pursuant to Rule 15 of the Rules for the Division of Business Among District Judges of the Southern District of New York, the *Lewis* action was assigned to this member of the Court as "related" to the *Spirt* action. The EEOC then moved, in both the *Spirt* action and the *Lewis* action, for an order, pursuant to Rule 42(a), Fed. R. Civ. P., consolidating the *Spirt* action and the *Lewis* action. By a motion filed May 21, 1981, the EEOC moved, pursuant to Rule 24, Fed. R. Civ. P., for leave to intervene as a plaintiff in the *Spirt* action.

In a notice of motion filed April 21, 1981, Deborah Moshowitz, Susan Alexion, and Renata Clynes moved, pursuant to Rule 24, Fed. R. Civ. P., for leave to intervene in the *Lewis*

action as plaintiffs on behalf of themselves and all others similarly situated. In a separate notice of motion, these three individuals moved for an order granting them leave to participate in the proceedings before the Court in the *Spirt* action as *amici curiae*. The Court granted the latter motion on December 23, 1981. Moshowitz, Alexion, and Clynes have also joined in the motions for consolidation filed by the EEOC in the *Spirt* action and the *Lewis* action. For its part, the EEOC has joined in the Moshowitz-Alexion-Clynes motion for leave to intervene in the *Lewis* action.

The American Association of University Professors ("the AAUP") filed two motions, one on May 12, 1981, and one on July 9, 1981. The first of these motions sought an order, pursuant to Rule 24, Fed. R. Civ. P., granting the AAUP leave to intervene in the *Lewis* action. The second motion sought a similar order granting the AAUP leave to intervene in the *Spirt* action.

During the spring and summer months of 1981, briefs and affidavits in support of or in opposition to the above-described motions were filed with the Court on an almost daily basis. The Court heard nearly two days of oral argument on these motions. On July 16, 1981, the Court informed counsel that it would accept no submissions on the then-pending motions after August 6, 1981. Six days later, the EEOC moved for summary judgment against Superintendent Lewis in both the *Spirt* action and the *Lewis* action. The Court, concerned that these motions would trigger another round of brief writing by the various interested parties, which would further delay the Court's decision of the motions already pending before it, and aware that the motion filed in the *Spirt* action would have to be denied if the EEOC were not granted leave to intervene in that action, determined to adjourn the EEOC's summary judgment motions until after the date of the Court's decision on the previously filed motions.

On August 12, 1981, the American Nurses' Association ("the ANA"), filed a motion, pursuant to Rule 24, Fed. R. Civ. P., seeking leave to intervene in the *Lewis* action. Given the similarity of this motion to others that had already been filed

and fully briefed, the Court determined not to adjourn it in similar fashion to the EEOC's summary judgment motions. On December 11, 1981, Moshowitz, Alexion, and Clynes, applicants for intervention in the *Lewis* action, moved for summary judgment, pursuant to Rule 56, Fed. R. Civ. P., against Superintendent Lewis in the *Lewis* action. Since this motion is substantially similar to the summary judgment motions filed by the EEOC in both the *Spirt* action and the *Lewis* action, and since it would be rendered moot if Moshowitz, Clynes, and Alexion were not granted leave to intervene in the *Lewis* action, the Court determined that this motion should, in identical fashion to the EEOC's summary judgment motions, be adjourned until after the date of the Court's decision on the previously filed motions.

By today's opinion, the Court decides all of the motions that have been filed in the *Spirt* action and the *Lewis* action except for the summary judgment motion filed by the EEOC in the *Lewis* action. For the reasons stated in the discussion that follows, the EEOC's motion for leave to intervene in the *Spirt* action is granted in part and denied in part, the EEOC's motion in the *Spirt* action for summary judgment against Superintendent Lewis is denied, the EEOC's motions to consolidate the *Spirt* action and the *Lewis* action are denied, the Moshowitz-Alexion-Clynes motion for leave to intervene in the *Lewis* action is denied, the Moshowitz-Alexion-Clynes motion in the *Lewis* action for summary judgment against Superintendent Lewis is denied, the AAUP's motion for leave to intervene in the *Lewis* action is denied, the ANA's motion for leave to intervene in the *Lewis* action is denied, the AAUP's motion for leave to intervene in the *Spirt* action is granted in part and denied in part, Spirt's motion for summary judgment against Superintendent Lewis is denied, the TIAA-CREF motion to dismiss Spirt's supplemental complaint is granted, and the TIAA-CREF motion for partial relief from the *Spirt* judgment is denied.

DISCUSSION

The Court has determined to discuss the motions that are the subject of today's opinion in the following sequence. First, the Court deals with the EEOC's motions to consolidate and the various motions to intervene filed by the EEOC, the AAUP, Moshowitz, Alexion, Clynes, and the ANA. Second, the Court discusses Spirt's motion for summary judgment against Superintendent Lewis and the TIAA-CREF cross-motion to dismiss Spirt's supplemental complaint. Third, the Court deals with the TIAA-CREF motion for partial relief from the *Spirt* judgment.

I. Motions to Intervene and Motions to Consolidate

While the various motions to intervene filed in the *Spirt* action and the *Lewis* action turn on some of the same questions, many of these motions are sufficiently distinct from the others that they must be analyzed separately from the others. Since the intervention motions, considered *in toto,* seek leave to intervene under Rules 24(a)(1), 24(a)(2), 24(b)(1), and 24(b)(2), Fed. R. Civ. P., analysis of these motions takes the Court into a necessarily lengthy, and possibly unprecedented, excursion into the entire parameters of Rule 24 of the Federal Rules of Civil Procedure. The EEOC motions to consolidate the *Spirt* action and the *Lewis* action must, in turn, be considered separately from all the intervention motions. The Court has organized its discussion of these motions as follows: (A) the EEOC motion to intervene in the *Spirt* action; (B) the EEOC motions to consolidate the *Spirt* action and the *Lewis* action; (C) the Moshowitz-Alexion-Clynes, AAUP, and ANA motions to intervene in the *Lewis* action; and (D) the AAUP motion to intervene in the *Spirt* action.

A. The EEOC Motion to Intervene in the Spirt *Action*

The EEOC has moved, pursuant to Rule 24(b)(1), Fed. R. Civ. P., for leave to intervene as a plaintiff in the *Spirt* action. The EEOC's desire to intervene in the *Spirt* action is based on

the failure of Spirt, plaintiff in the *Spirt* action, to oppose the TIAA-CREF motion for partial relief from the *Spirt* judgment. In the EEOC's view, the TIAA-CREF motion is based on an incorrect legal premise. Given that the *Spirt* action is not a class action, *see Spirt I, supra*, 416 F. Supp. at 1025, meaning that the Court has no obligation under Rule 23(e), Fed. R. Civ. P., the EEOC argues that the Court will have no choice but to endorse the allegedly incorrect legal premise that underpins the TIAA-CREF motion (by granting the TIAA-CREF motion as unopposed) unless the EEOC is permitted to intervene as a plaintiff in the *Spirt* action in order to oppose the TIAA-CREF motion. However, notwithstanding its rather narrow reason for seeking to intervene in the *Spirt* action, the EEOC's intervention motion seeks an order under which the EEOC (1) would not be bound by the *Spirt* judgment or by any findings of fact or conclusions of law previously made in the *Spirt* action, and (2) would be permitted to file a complaint alleging that TIAA has violated Title VII, notwithstanding the fact that the Court specifically held in *Spirt II* that "application of Title VII to TIAA in this case is precluded by the McCarran Act." 475 F.Supp. at 1304.

Under Rule 24(b)(1), "[u]pon timely application anyone may be permitted to intervene in an action . . . when a statute of the United States confers a conditional right to intervene." Such a conditional right is conferred upon the EEOC by Title VII, which provides that, "[u]pon timely application, the court may, in its discretion, permit the [EEOC] . . . to intervene in [a civil action brought under Title VII by a person claiming to be aggrieved by a violation of Title VII] upon certification that the case is of general public importance." 42 U.S.C. § 2000e-5(f)(1). In a statement filed with the Court, the EEOC has certified that the *Spirt* action is a case of "general public importance." Thus, the EEOC's motion for leave to intervene in the *Spirt* action under Rule 24(b)(1) should be granted if (1) the EEOC's application to intervene was "timely" filed within the meaning of 42 U.S.C. § 2000e-5(f)(1) and Rule 24; and (2) the circumstances of the *Spirt* action are such that the Court is inclined to exercise its discretionary power to issue an order

granting the EEOC leave to intervene in the *Spirt* action. *See Women's Committee for Equal Employment Opportunity* v. *National Broadcasting Co.*, 71 F.R.D. 666, 671-72 (S.D. N.Y.1976).

The Court begins by analyzing whether the EEOC has made a sufficient showing to satisfy the second of the two requirements set forth above. In determining whether to exercise its discretion to permit a Rule 24(b)(1) intervention, the trial court must consider whether the proposed intervention will unduly delay or prejudice the adjudication of the rights of the original parties to the action, *see* Rule 24(b), Fed. R. Civ. P., and be attentive to the principle that "[d]istrict courts should not be niggardly in allowing a government agency to intervene in cases involving a statute it is required to enforce; indeed, a hospitable attitude is appropriate," *see Blowers* v. *Lawyers Co-operative Publishing Co.*, 527 F.2d 333, 334 (2d Cir. 1975) (per curiam); *Sobel* v. *Yeshiva University*, 438 F. Supp. 625, 627 (S.D.N.Y. 1977). Given that the EEOC does not propose to be bound by the Court's decision in *Spirt II*, and that the EEOC's proposed complaint seeks legal relief that the Court denied Spirt in *Spirt II* by awarding summary judgment in favor of TIAA, it is apparent that an order allowing the broad intervention sought by the EEOC's motion would open the door to the relitigation of *Spirt II* and hence would severely threaten both to delay and to prejudice adjudication of the rights of the original parties to the *Spirt* action. Since such a broad order is in no way necessitated by the reason advanced by the EEOC in favor of granting it leave to intervene, namely, the EEOC's desire to oppose the TIAA-CREF motion for partial relief from the *Spirt* judgment, the Court is convinced that the issuance of such an order would be an improper exercise of its discretion under Rule 24(b)(1).

The Court observes, however, that there is ample authority for a district court faced with a Rule 24(b)(1) motion to impose conditions on its grant of intervention. *See Ionian Shipping Co.* v. *British Law Insurance Co.*, 426 F.2d 186, 191-92 (2d Cir. 1970); 3B *Moore's Federal Practice* ¶ 24.10[4], at 24-396 (2d ed. 1981); 7A C. Wright & A. Miller, *Federal Practice and*

Procedure § 1922, at 623-24 (1972). Specifically, the trial court may condition the grant of a motion for leave to intervene by requiring the intervenor to abide by the court's previous decisions, *see, e.g., Fox* v. *Glickman Corp.*, 355 F.2d 161, 164 (2d Cir. 1965), *cert. denied*, 384 U.S. 960 (1966), or by limiting the issues that the intervenor is permitted to contest, *see, e.g., Benson* v. *Little Rock Hilton Inn*, 87 F.R.D. 447, 449 (E.D. Ark. 1980); *Carroll* v. *American Federation of Musicians*, 33 F.R.D. 353, 354 (S.D.N.Y. 1963). For several reasons, the Court believes that it would be properly exercising its discretion under Rule 24(b)(1) were it to grant the EEOC leave to intervene in the *Spirt* action solely for the purpose of contesting the issue raised by TIAA-CREF motion for partial relief from the *Spirt* judgment. First, since the parties in the *Spirt* action agree that the Court has never decided the issue raised by the TIAA-CREF motion for relief from judgment, and since the Court decides that issue by today's opinion, the Court does not believe that the parties to the *Spirt* action would be threatened with undue delay in or prejudice to the adjudication of their rights were the EEOC granted leave to intervene as a plaintiff in the *Spirt* action with respect to this one issue. Second, such a limited intervention would, in the Court's view, fully respond to the EEOC's purported "need" to intervene in the *Spirt* action.[1]

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1 The Court recognizes that TIAA and CREF reject the EEOC's proposition that, given Spirt's failure to oppose the TIAA-CREF motion for partial relief from the *Spirt* judgment, the Court will be unable to deny that motion unless the EEOC becomes a party to the *Spirt* action and files opposition to the TIAA-CREF motion. Indeed, the Court is frank to say that it has some doubts concerning the putative "need" for EEOC intervention in the *Spirt* action. Were the Court to grant the TIAA-CREF motion as unopposed, this decision would not be an adjudication of the legal issues raised by the motion, and thus would not prejudice the EEOC, as *stare decisis* or on any other theory, with respect to other cases presently being litigated by the EEOC. Further, while counsel for Spirt has filed no formal opposition to the TIAA-CREF motion, the fact is that, at oral argument of this motion, counsel for Spirt and counsel for TIAA and CREF disagreed on the proper disposition of the TIAA-CREF motion. Transcript, June 2, 1981, at 214. Under the principles set forth by the Court in part II of today's

Notwithstanding the foregoing, the Court may not permit the EEOC to intervene in the *Spirt* action, even in this limited manner, if the EEOC's motion to intervene was not "timely" filed within the meaning of 42 U.S.C. § 2000e-5(f)(1) and Rule 24. Generally, the timeliness of an application for intervention under Rule 24 is a question addressed to the sound discretion of the trial court, to be decided by reference to all the relevant circumstances. *United States* v. *International Business Machines Corp.*, 62 F.R.D. 530, 541 (S.D.N.Y. 1974). Specifically, whether a motion to intervene has been "timely" filed is to be judged not merely by the calendar, but also by reference to (1) the purpose for which intervention is sought, (2) the length of time the applicant for intervention knew of its interest in the suit before moving for leave to intervene, and (3) whether the requested intervention will delay the litigation or prejudice a party to the action. *See Michigan Association for Retarded Citizens* v. *Smith*, 657 F.2d 102, 105 (6th Cir. 1981); *Carey* v.

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opinion, then, there is sufficient adversity between Spirt on the one hand and TIAA and CREF on the other with respect to the TIAA-CREF motion to make the legal issue raised by the TIAA-CREF motion justiciable in the *Spirt* action even if the EEOC were not a party to the *Spirt* action.

Unfortunately for TIAA and CREF, there is no authority for the proposition that the EEOC must demonstrate a need for intervention in order to succeed on a Rule 24(b)(1) motion. *Meyer* v. *Macmillan Publishing Co.*, 85 F.R.D. 149, 150 (S.D.N.Y. 1980). Thus, even if TIAA and CREF were correct that the EEOC has failed to articulate any real need to become a party to the *Spirt* action, this fact would not by itself control the Court's decision of the EEOC's motion to intervene, but would be one of several factors relevant to the Court's decision whether to exercise its discretion under Rule 24(b)(1). In fact, the EEOC has, by pointing out that its position with respect to the TIAA-CREF motion differs from that advanced by TIAA and CREF and also from that advanced by Spirt, demonstrated a real, if not compelling, need for its limited participation in the *Spirt* action. Even if this need did not exist, however, the failure of any party to the *Spirt* action to show that delay or prejudice would flow from the limited intervention contemplated by the Court, when coupled with the judicial deference that should be given to the EEOC's decision that the *Spirt* action warrants the allocation of its limited resources, *see id.* at 150-51, would incline the Court to believe that its discretion would best be exercised by allowing the EEOC to intervene with respect to the issue raised by the TIAA-CREF motion.

Klutznick, 88 F.R.D. 249, 250 (S.D.N.Y. 1980); *Evans* v. *Lynn*, 376 F. Supp. 327, 330 (S.D.N.Y. 1974), *aff'd en banc*, 537 F.2d 589 (2d Cir. 1976), *cert. denied*, 429 U.S. 1066 (1977); *McCausland* v. *Shareholders Management Co.*, 52 F.R.D. 521, 524 (S.D.N.Y. 1971).

Not surprisingly, in light of the delay and prejudice that the grant of *post-judgment* intervention typically creates, the courts of this Circuit are not normally inclined to find such motions to have been "timely" made. *See, e.g., Crown Financial Corp.* v. *Winthrop Lawrence Corp.*, 531 F.2d 76, 77 (2d Cir. 1976) (per curiam); *Firebird Society of New Haven, Inc.* v. *New Haven Board of Fire Commissioners*, 66 F.R.D. 457, 464-65 (D. Conn.), *aff'd mem.*, 515 F.2d 504 (2d Cir.), *cert. denied*, 423 U.S. 867 (1975). Nevertheless, it is beyond peradventure that post-judgment intervention motions are, in certain circumstances, "timely," *see, e.g., United Airlines, Inc.* v. *McDonald*, 432 U.S. 385, 396 (1977), and that such circumstances may be presented where, as is the case here, intervention is sought with respect to a post-judgment proceeding that seeks to resolve a substantial problem in formulating the relief to be granted on account of the judgment, *see Hodgson* v. *United Mine Workers*, 473 F.2d 118, 129 (D.C. Cir. 1972). Where post-judgment intervention is sought in order to participate in the relief or appellate phases of a litigation, the "timeliness" of the application to intervene must be determined by asking whether, in view of all the circumstances, the intervenor acted promptly after the entry of the judgment. *United Airlines, Inc.* v. *McDonald, supra*, 432 U.S. at 395-96. Here, the parties to the *Spirt* action agree that the issue raised by the TIAA-CREF motion for partial relief from the *Spirt* judgment was not presented to the Court prior to the commencement of the appeals from that judgment. Once the *Spirt* judgment was on appeal, the EEOC plainly could not have addressed a motion to intervene in the *Spirt* action to this Court. *See Rolle* v. *New York City Housing Authority*, 294 F. Supp. 574, 576 (S.D.N.Y. 1969). Thus, the EEOC's opportunity to seek leave to intervene in the *Spirt* action with respect to the issue raised by the TIAA-CREF motion for relief from

judgment first arose when the Court of Appeals remanded the *Spirt* action to this Court in order that TIAA and CREF might file a motion raising that issue. The EEOC moved to intervene less than two months after the TIAA-CREF motion was filed. As previously noted, the litigation of the *Spirt* action would not be delayed by allowing the EEOC to intervene to contest the issue raised by the TIAA-CREF motion for relief from judgment; further, no party to the *Spirt* action would be prejudiced by such a limited intervention. On the basis of all these circumstances, the Court finds that, insofar as the issue raised by the TIAA-CREF motion for relief from judgment is concerned, the EEOC moved to intervene "promptly" after entry of the *Spirt* judgment. The Court therefore holds that the EEOC's application for intervention was "timely" filed, within the meaning of 42 U.S.C. § 2000e-5(f)(1) and Rule 24, Fed. R. Civ. P., to the extent the EEOC seeks leave to intervene in order to oppose that motion.[2]

Accordingly, the EEOC's motion pursuant to Rule 24(b)(1), Fed. R. Civ. P., for leave to intervene in the *Spirt* action is

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2 The Court observes that, even if it were inclined to exercise its discretion to allow the EEOC to intervene in the *Spirt* action for any other purpose than to oppose the TIAA-CREF motion for partial relief from the *Spirt* judgment, it would be precluded from doing so by virtue of the fact that the EEOC's application to intervene was not timely filed insofar as it seeks an order granting the EEOC leave to intervene in the *Spirt* action for such other purposes. The EEOC moved to intervene approximately seven years after the *Spirt* action was commenced and approximately two years after a final judgment was entered in the *Spirt* action. With the exception of the issue raised by the TIAA-CREF motion for partial relief from the *Spirt* judgment, the EEOC has known of the issues raised by the *Spirt* action throughout the pendency of the *Spirt* action. Allowance of the broad intervention sought by the EEOC would delay adjudication of and prejudice the existing parties to the *Spirt* action in the fashion described by the Court in text *supra*. Under these circumstances, the principles recited in text *supra* would require the Court to conclude, were it to reach the question, that the EEOC's application to intervene in the *Spirt* action was not "timely" filed, within the meaning of Rule 24, Fed. R. Civ. P., to the extent the EEOC seeks leave to intervene with respect to issues other than the one raised by the TIAA-CREF motion for partial relief from the *Spirt* judgment.

granted in part and denied in part. The EEOC is granted leave to intervene as a plaintiff in the *Spirt* action only for the purpose of contesting the TIAA-CREF motion for partial relief from the *Spirt* judgment. With respect to the other issues pending before the Court in the *Spirt* action, the EEOC shall have leave to participate in the *Spirt* action as an *amicus curiae*. *See Blowers* v. *Lawyers Co-operative Publishing Co., supra*, 527 F.2d at 334. Since it has been denied leave to intervene in the *Spirt* action with respect to any issue involving Superintendent Lewis, the EEOC's motion in the *Spirt* action for summary judgment against Superintendent Lewis is denied.

B. The EEOC Motions to Consolidate the Spirt *Action and the* Lewis *Action*

The EEOC has moved, in both the *Spirt* action and the *Lewis* action, for an order consolidating the *Spirt* action and the *Lewis* action pursuant to Rule 42(a), Fed. R. Civ. P. Moshowitz, Alexion, and Clynes have, notwithstanding the fact that they are not parties to either action, joined in those motions. The EEOC seeks, by its motions to consolidate, to have the *Spirt* action and the *Lewis* action consolidated for all purposes. Memorandum of Points and Authorities in Support of Motion of Equal Employment Opportunity Commission to Consolidate, May 4, 1981, at 2.

Under Rule 42(a), a trial court may, "[w]hen actions involving a common question of law or fact are pending before [it]," "order [that] all the actions [be] consolidated." Thus, an order of consolidation such as the EEOC seeks here is only permissible (1) if the actions in question involve a common question of law or fact, *see Flintkote Co.* v. *Allis-Chalmers Corp.*, 73 F.R.D. 463, 464-65 (S.D.N.Y. 1977), and (2) if the court to which the consolidation motion is addressed has jurisdiction for all purposes over each of the actions in question, *see In re Penn Central Commercial Paper Litigation*, 62 F.R.D. 341, 344 (S.D.N.Y. 1974), *aff'd mem.*, 515 F.2d 505 (2d Cir. 1975). Even if this standard is met, the decision whether to order consolidation is still left to the discretion of the trial court. *Jamroz* v. Blum, 509 F. Supp. 953, 956 (N.D.N.Y. 1981). In determining

whether consolidation is proper, the trial court must weigh the prospective benefits of consolidation, in terms of convenience to the parties and judicial economy, against the extent of any confusion, delay, or prejudice that might result from consolidation. *Tucker* v. *Arthur Andersen & Co.*, 73 F.R.D. 316, 317 (S.D.N.Y. 1976). The party seeking consolidation has the burden of persuading the trial court that the balance of these considerations tips in favor of consolidation. *Transeastern Shipping Corp.* v. *India Supply Mission*, 53 F.R.D. 204, 206 (S.D.N.Y. 1971).

In light of the foregoing principles, the Court finds that it may not properly order the consolidation that the EEOC seeks here. As noted, the *Spirt* action is before this Court on a limited remand from the Court of Appeals for this Circuit. Since this Court does not have jurisdiction over the *Spirt* action for all purposes, this Court may not permissibly order consolidation of the *Lewis* action and the *Spirt* action for all purposes. Even if the Court *could* issue such an order, the EEOC has failed to persuade the Court that an order consolidating the *Spirt* action and the *Lewis* action for all purposes would be a sound exercise of its discretion. The two actions may indeed present a common issue of law: whether Superintendent Lewis violated Title VII by refusing to approve Unisex II. However, as the Court holds in part II of today's opinion, this issue is not justiciable in the context of the *Spirt* action. There consequently can be no doubt that an order consolidating these two actions for all purposes would, by making the issue of Superintendent Lewis' liability under Title VII justiciable in the *Spirt* action, threaten to delay final adjudication of the *Spirt* action, to prejudice the original parties to the *Spirt* action, and to create confusion in the subsequent litigation of both the *Spirt* action and the *Lewis* action. Further, since the Court's holding that the issue of Superintendent Lewis' liability under Title VII is not justiciable in the *Spirt* action does not prejudice the EEOC's ability to litigate this issue in the *Lewis* action, the EEOC is not prejudiced by being denied an opportunity to litigate this issue in the *Spirt* action. Accordingly, the Court denies the EEOC's motions, filed in both the *Spirt*

action and the *Lewis* action, for an order consolidating these two actions pursuant to Rule 42(a), Fed. R. Civ. P.

C. The Moshowitz-Alexion-Clynes, AAUP, and ANA Motions to Intervene in the Lewis *Action*

Moshowitz, Alexion, Clynes, the AAUP, and the ANA have all moved, pursuant to Rules 24(a)(1), 24(a)(2), and 24(b)(2), Fed. R. Civ. P., for leave to intervene as plaintiffs in the *Lewis* action. The applicants for intervention in the *Lewis* action were all actuated to file their motions by a desire to challenge, in identical fashion to the EEOC's complaint in the *Lewis* action, the conduct of Superintendent Lewis in refusing to approve Unisex II. The EEOC, plaintiff in the *Lewis* action, has joined in the Moshowitz-Alexion-Clynes motion insofar as it relies on Rule 24(a)(1). In the paragraphs that follow, the Court deals in turn with each of the three bases for intervention relied upon by the movants.

1. Rule 24(a)(1). Rule 24(a)(1), Fed. R. Civ. P., provides that "[u]pon timely application anyone shall be permitted to intervene in an action . . . when a statute of the United States confers an unconditional right to intervene." Since the Court finds that each of the three motions to intervene in the *Lewis* action was filed in a timely fashion,[3] it must grant these motions to the extent that a statute of the United States confers an unconditional right to intervene upon the movants. Title VII does confer upon certain persons an unconditional right to intervene in an enforcement action brought by the EEOC. The relevant statutory language states that "[t]he person or persons

3 TIAA and CREF base their contention that these motions were not timely filed on their hypothesis that the *Lewis* action and the *Spirt* action would be consolidated, meaning that the motions to intervene in the *Lewis* action really ought to be treated as if they were motions to intervene in the *Spirt* action. Since the Court, by today's opinion, denies the EEOC's motions to consolidate the *Spirt* action and the *Lewis* action, the TIAA-CREF theory of untimeliness clearly fails. There can be no doubt, given that the motions to intervene in the *Lewis* action were filed promptly after the filing of the complaint in that action, and that there has been virtually no litigation on the merits in the *Lewis* action, that these motions were timely filed insofar as the *Lewis* action is concerned.

aggrieved [by an alleged violation of Title VII] shall have the right to intervene in a civil action brought by the [EEOC, on account of the alleged violation, pursuant to 42 U.S.C. § 2000e-5(f)(1)]." 42 U.S.C. § 2000e-5(f)(1).

The right of the movants to intervene in the *Lewis* action under Rule 24(a)(1) thus depends on whether they are "persons aggrieved" as that term is used in the above-quoted statutory language. All the parties agree that, in order to qualify as a "person aggrieved" within the meaning of the intervention provision contained in 42 U.S.C. § 2000e-5(f)(1), one must at least have an interest in the litigation sufficient to establish standing under article III of the United States Constitution. *See EEOC* v. *American Telegraph & Telephone Co.*, 506 F.2d 735, 740 (3d Cir. 1974); *cf. Senter* v. *General Motors Corp.*, 532 F.2d 511, 516-17 (6th Cir.), *cert. denied*, 429 U.S. 870 (1976); *Hackett* v. *McGuire Brothers, Inc.*, 445 F.2d 442, 446 (3d Cir. 1971) (both applying article III standing analysis to determine whether plaintiff was a "person aggrieved" entitled to commence a private Title VII action under 42 U.S.C. § 2000e-5(f)(1)). However, TIAA and CREF assert that, in addition to this requirement, intervention in an EEOC-filed civil action pursuant to 42 U.S.C. § 2000e-5(f)(1) is limited to the person or persons who actually filed the charge that prompted the EEOC to commence the action.

The Court has found no case that rules on whether the intervention provision contained in 42 U.S.C. § 2000e-5(f)(1) is properly interpreted as imposing the additional requirement urged by TIAA and CREF. It observes, however, that the interpretation advanced by TIAA and CREF is strongly supported by the structure of 42 U.S.C. § 2000e-5(f)(1) as a whole. Elsewhere in that section, the EEOC is required, in the event it dismisses a charge, or in the event a charge does not lead to the EEOC's commencement of a civil action within 180 days after its filing, to notify "the person aggrieved" of this fact. Upon receipt of such a notice, commonly known as "right-to-sue" letter, "the person claiming to be aggrieved" may bring a civil action against the respondent named in the charge. It seems plain from the face of the statute that the person whom the

Commission is required to notify, and who thereby gains the right to sue, is the person who filed the charge—not every person who might have had constitutional standing to file a similar charge or to commence a similar civil action. If, as the wording of the statute indicates, the term "person aggrieved," when used in the context of an EEOC decision to dismiss or to decline to act on a charge, means the person who filed the charge, logic dictates that Congress must have intended to give "person aggrieved" the same meaning when it used this term in the context of an EEOC decision to commence a civil action on the basis of a charge. In other words, if Congress intended for the person who filed the charge ("the person aggrieved") to be the only person statutorily entitled to notice and consequently to file suit in the event the EEOC dismissed or declined to act on the charge, Congress must also have intended for the person who filed the charge ("the person aggrieved") to be the only person statutorily entitled to intervene in the event the EEOC determined to commence a civil action based on the charge.

The Court's view that the statutory language strongly indicates that Congress, in drafting the intervention provision contained in 42 U.S.C. § 2000e-5(f)(1), must have used the term "person aggrieved" to refer to a person who filed a charge with the EEOC is fully supported by the legislative history of that section. The wording of 42 U.S.C. § 2000e-5(f)(1) was agreed upon at a House-Senate conference on the bills that ultimately were enacted as the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (1972). The conference report explained the section as follows:

> The conferees adopted a provision allowing the Commission, or the Attorney General in a case against a state or local government agency, to bring an action in Federal district courts if the Commission is unable to secure from the respondent "a conciliation agreement acceptable to the Commission." Aggrieved parties are permitted to intervene. They may bring a private action if the Commission or Attorney General has not brought suit within 180 days or the Commission has entered into a conciliation

> agreement to which such aggrieved party is not a signatory. The Commission, or the Attorney General in a case involving state and local governments, may intervene in such private action.

H.R. Conf. Rep. No. 899, 92d Cong., 2d Sess. 17-18 (1972), *reprinted in* [1972] U.S. Code Cong. & Ad. News 2137, 2182. From this explanation, the Court concludes that the conferees had two principles firmly in mind when they wrote 42 U.S.C. § 2000e-5(f)(1): (1) in order to commence a private Title VII civil action as a "person aggrieved," the prospective plaintiff must, *inter alia*, first have filed a charge with the EEOC; and (2) the term "person aggrieved" has an identical meaning in reference to both the persons entitled to commence a private civil action under Title VII and the persons entitled to intervene in an EEOC-filed civil action under Title VII. A third principle inevitably flows from these two: in order to intervene in an EEOC-filed Title VII civil action as a "person aggrieved," the prospective intervenor must, *inter alia*, have filed the charge with the EEOC that prompted the action.

On the basis of a consideration of just the language and legislative history of the statute, then, the Court would be inclined to hold that the right of intervention provided in 42 U.S.C. § 2000e-5(f)(1) may only be invoked by a person (1) who has an interest in the action sufficient to establish standing under article III of the United States Constitution, and (2) who filed the charge that prompted the EEOC to commence the action in which intervention is sought. However, the Court notes that, under existing case law, a private person having article III standing will be permitted to *commence* a private Title VII action as a "person aggrieved" within the meaning of 42 U.S.C. § 2000e-5(f)(1) if (1) the plaintiff previously filed a charge with the EEOC, *or* (2) some other private person previously filed an EEOC charge "so similar [to the claim stated in the plaintiff's complaint] that no conciliatory purpose would [have been] served" if the plaintiff had also filed a charge with the EEOC. *Foster* v. *Gueory*, 655 F.2d 1319, 1322 (D.C. Cir. 1981). That is, if the plaintiff has article III

standing, but has not previously filed an EEOC charge, he or she will still be a proper Title VII plaintiff as long as *someone else* has previously filed an EEOC charge "nearly identical" to the claim set forth in the plaintiff's complaint. *Id.* at 1323; *accord, Crawford* v. *United States Steel Corp.*, 660 F.2d 663, 666 (5th Cir. 1981).

In the Court's view, it would be nonsensical for the courts to give the term "person aggrieved," as used in 42 U.S.C. § 2000e-5(f)(1), one meaning for the purpose of determining a person's right to commence a private Title VII action and a second, different meaning in order to determine a person's right to intervene in an EEOC-filed Title VII action. Accordingly, the Court, while attentive to the language and legislative history of the intervention provision contained in 42 U.S.C. § 2000e-5(f)(1),[4] holds on the basis of the judicial precedent just discussed that the right of intervention provided in 42 U.S.C. § 2000e-5(f)(1) may only be invoked if (1) the proposed intervenor has an interest in the action sufficient to establish standing under article III of the United States Constitution, and (2) the action was commenced by the EEOC in response to a charge filed either (a) by the proposed intervenor or (b) by

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4 The parties have not referred the Court to any administrative interpretation of the intervention provision contained in 42 U.S.C. § 2000e-5(f)(1). The EEOC, in its memorandum in support of the Moshowitz-Alexion-Clynes intervention motion, does not argue that the statute gives Moshowitz, Alexion, and Clynes an unconditional right to intervene; the EEOC states merely that the *policy* of the statute would be served by permitting these three persons to intervene. Unfortunately for the proposed intervenors, Rule 24(a)(1) is limited to situations where "a statute of the United States confers an unconditional right to intervene," and cannot be read to apply in cases where "a statute of the United States is based on a policy that supports allowance of the proposed intervention." Even if the EEOC had taken the express position, either in its regulations or in a brief filed with the Court, that 42 U.S.C. § 2000e-5(f)(1) should be interpreted to confer on some or all of the proposed intervenors an unconditional right to intervene in the *Lewis* action, the Court is extremely doubtful that it would be disposed to endorse such an interpretation in the face of the contradictory language and legislative history of the statute.

another private party having a nearly identical claim to the claim raised by the proposed intervenor.

None of the proposed intervenors in the *Lewis* action has satisfied the second prong of this test. The AAUP has never filed a charge with the EEOC relative to any of the named defendants in the *Lewis* action. While Moshowitz, Alexion, Clynes, and the ANA have filed such charges relative to TIAA and CREF, these charges in no way challenged any conduct performed by Superintendent Lewis and did not prompt the EEOC's commencement of the *Lewis* action.[5] There has been no suggestion that the *Lewis* action was commenced in response to a privately filed charge against Superintendent Lewis "nearly identical" to the claims raised against Superintendent

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5 The Court rejects the argument that Moshowitz, Alexion, Clynes, and the ANA, simply because they once filed charges with the EEOC against TIAA and CREF, therefore must be permitted to intervene in the *Lewis* action in spite of the fact that their charges in no way involved Superintendent Lewis and had nothing to do with the commencement of the *Lewis* action. It must be remembered that the *Lewis* action only challenges conduct performed by *Superintendent Lewis,* and that TIAA and CREF are named as defendants only on the theory that their joinder is required by Rule 19. The Court refuses to believe that Congress, when it enacted the intervention provision contained in 42 U.S.C. § 2000e-5(f)(1), intended for *anyone* who files a charge with the EEOC against a particular person thereby to gain an *unconditional* right to intervene in *any* EEOC action naming the charged person as a defendant, no matter where, when, or under what circumstances the action in which intervention is sought happened to be commenced. Under this interpretation of 42 U.S.C. § 2000e-5(f)(1), any of the charging parties in any of the numerous Title VII actions against TIAA and CREF currently pending around the country would have an *absolute right* to intervene in the *Lewis* action. The Court does not believe that Congress could have intended this result, particularly when it observes (1) that Moshowitz, Alexion, and Clynes did not choose to intervene in *EEOC* v. *Columbia University,* No. 78 Civ. 4420(TPG) (S.D.N.Y.), an action commenced by the EEOC against TIAA and CREF on the basis of a charge filed with the EEOC by Moshowitz, Alexion, and Clynes, and (2) that the ANA is the plaintiff in *ANA* v. *TIAA,* No. C-75-558-G (M.D.N.C.), an action commenced by the ANA against TIAA and CREF on the basis of a charge filed with the EEOC by the ANA.

Lewis here by the proposed intervenors.[6] Thus, none of the proposed intervenors in the *Lewis* action has an unconditional right to intervene in the *Lewis* action by virtue of 42 U.S.C. § 2000e-5(f)(1). The Court accordingly denies their motions to intervene in the *Lewis* action insofar as they rely on Rule 24(a)(1).

2. Rule 24(a)(2). Rule 24(a)(2), Fed. R. Civ. P., provides that "[u]pon timely application anyone shall be permitted to intervene in an action . . . when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties." Thus, Rule 24(a)(2) sets forth a four-part test for intervention as of right. Under this test, an applicant for intervention must be permitted to intervene in an action if (1) the application was made in timely fashion, (2) the applicant claims an interest relating to the property or transaction that is the subject of the action, (3) the applicant is so situated that disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect that interest, and (4) the applicant's interest is not adequately represented by existing parties. *Foster* v. *Gueory, supra,* 655 F.2d at 1324-25; *United States Postal Service* v.

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6 Indeed, there has been no suggestion that the *Lewis* action was commenced in response to *any* privately filed charge. The Court assumes, for the purposes of today's opinion, that the EEOC commenced the *Lewis* action under the authority of 42 U.S.C. § 2000e-5(f)(1). If the *Lewis* action was not commenced under 42 U.S.C. § 2000e-5(f)(1), there is plainly no argument that any private party may intervene as of right in the *Lewis* action pursuant to Rule 24(a)(1). *EEOC* v. *United Air Lines, Inc.*, 515 F.2d 946, 949 (7th Cir. 1975). Of course, 42 U.S.C. § 2000e-5(f)(1) would only provide a jurisdictional basis for the *Lewis* action if (1) the *Lewis* action was commenced in response to a charge filed by a person aggrieved or by a member of the EEOC, and (2) Superintendent Lewis is an "employer" within the meaning of Title VII. *See* 42 U.S.C. § 2000e-5(b). The Court does not decide either of these questions by today's opinion.

Brennan, 579 F.2d 188, 191 (2d Cir. 1978); *Weisman* v. *Darneille,* 89 F.R.D. 47, 50 (S.D.N.Y. 1980).

There can be little doubt that the first three prongs of this test are satisfied with respect to each of the applicants to intervene in the *Lewis* action. First, their applications for intervention were, for the reasons set forth in note 3 *supra,* made in a timely fashion. Second, since the alleged conduct challenged by the EEOC's complaint in the *Lewis* action directly threatens significantly to affect the amount of retirement benefits that Moshowitz, Alexion, Clynes, and members of the AAUP and the ANA will be contractually entitled to receive on account of their future contributions to the TIAA and CREF plans, the movants claim a sufficient Rule 24(a)(2) interest relating to the transactions that are the subject of the *Lewis* action. *See New York Public Interest Research Group, Inc.* v. *Regents of the University of the State of New York,* 516 F.2d 350, 352 (2d Cir. 1975) (per curiam) (association has requisite interest for purposes of Rule 24(a)(2) if some of its members have the requisite Rule 24(a)(2) interest and association exists to protect that interest); *In re Penn Central Commercial Paper Litigation, supra,* 62 F.R.D. at 346 (interest that is significant, directly affected by challenged conduct, and legally protectable is sufficient to satisfy this portion of Rule 24(a)(2)). Third, since the Court's adjudication of the *Lewis* action could have a *stare decisis* effect that would negatively impact on the movants' hopes for success in other litigations involving TIAA and CREF, there can be no doubt that the movants are so situated that the Court's disposition of the *Lewis* action may impair or impede their ability to protect the interest described above. *Foster* v. *Gueory, supra,* 655 F.2d at 1325; *New York Public Interest Research Group, Inc.* v. *Regents of the University of the State of New York, supra,* 516 F.2d at 352 (both holding that possible *stare decisis* effect of court's decision creates sufficient threat of "impairment" of applicant's interest to satisfy this portion of Rule 24(a)(2)).

The difficult question with respect to Rule 24(a)(2) is whether the fourth prong of the test set forth above has been satisfied. The determination whether the applicant's interest is

adequately represented by existing parties is a decision within the sound discretion of the trial court. *Rios* v. *Enterprise Association Steamfitters Local 638,* 520 F.2d 352, 355 (2d Cir. 1975). Generally, this prong of the Rule 24(a)(2) test imposes only a "minimal" burden on the applicant for intervention, *see Trbovich* v. *United Mine Workers,* 404 U.S. 528, 538 n.10 (1972), under which the movant is merely required to show that the representation afforded its interest by existing parties "may be" inadequate. *United States Postal Service* v. *Brennan, supra,* 579 F.2d at 191. However, where one of the parties to the action in which intervention is sought is charged by law with representing the interest of the applicant for intervention, the movant faces a more stringent burden; in such a case, a very strong showing of inadequate representation must be made. 7A C. Wright & A. Miller, *Federal Practice & Procedure* § 1909, at 525-31 (1972).

TIAA and CREF urge that, since the EEOC is the plaintiff in the *Lewis* action, the applicants for intervention in the *Lewis* action are subject to the more stringent burden described above. However, the movants point out that the EEOC is charged by law with representing the *public* interest in the *Lewis* action, and not necessarily the interests of the movants. On this basis, the movants argue that they should be required only to make the above-described "minimal" showing of inadequacy of representation in order to satisfy their burden on this point. The Court agrees with the movants. "[U]nder the procedural structure created by the [Equal Employment Opportunity Act of 1972, *supra*], the EEOC does not function simply as a vehicle for conducting litigation on behalf of private parties. . . ." *Occidental Life Insurance Co.* v. *EEOC,* 432 U.S. 355, 368 (1977). Rather, "[w]hen the EEOC acts, . . . it acts also to vindicate the public interest in preventing employment discrimination." *General Telephone Co.* v. *EEOC,* 446 U.S. 318, 326 (1980). "In achieving the broad social and economic objectives of [Title VII], the [EEOC] may be more concerned with future compliance with [Title VII] by employers than with redressing employee grievances that have accrued already." *McClain* v. *Wagner Electric Corp.,* 550 F.2d

1115, 1121-22 (8th Cir. 1977). Thus, when it files an enforcement action, "the EEOC is not merely a proxy for the victims of discrimination." *General Telephone Co.* v. *EEOC, supra,* 446 U.S. at 326. The EEOC cannot, therefore, be regarded as charged by law with representing the interests of the applicants for intervention in the *Lewis* action; accordingly, these applicants need only make the customarily required "minimal" showing of inadequate representation.

However, the movants have failed to make even this showing. The complaint in the *Lewis* action alleges that Superintendent Lewis has applied the New York Insurance Law in a manner that the EEOC contends conflicts with the United States Constitution, Title VII, and the Equal Pay Act. The EEOC seeks a declaratory judgment to this effect and an injunction against such unlawful conduct. The proposed intervenors challenge Superintendent Lewis' conduct in precisely the same fashion and seek an identical judgment against Superintendent Lewis. They have not suggested that the EEOC might fail to raise an argument that supports the judgment that they seek. The EEOC and the proposed intervenors agree that the *Lewis* action is ripe for summary judgment, meaning that there is no question of a possible conflict in trial strategy. Thus, the *Lewis* action is not a case where the Court need be concerned that the EEOC's goal is not necessarily coterminous with the goals of individual victims of discrimination. On the contrary, from all appearances the *Lewis* action is a case where the plaintiff has the identical ultimate objective as the applicants for intervention. *See United States Postal Service* v. *Brennan, supra,* 579 F.2d at 191. The proposed intervenors have not overcome the presumption of adequate representation that arises in such a case. *Virginia* v. *Westinghouse Electric Corp.,* 542 F.2d 214, 216 (4th Cir. 1976). Accordingly, they have not shown that they are entitled to intervene as of right under Rule 24(a)(2).

3. Rule 24(b)(2). Under Rule 24(b)(2), Fed. R. Civ. P., "[u]pon timely application anyone may be permitted to intervene in action . . . when an applicant's claim or defense and the main action have a question of law or fact in common."

Thus, intervention as a plaintiff under Rule 24(b)(2) is permissible only if (1) the application to intervene was made in timely fashion, and (2) the applicant's claim and the plaintiff's claim have a question of law or fact in common. In cases where Rule 24(b)(2) intervention is *permissible,* the decision whether intervention should be *permitted* is wholly discretionary with the trial court. *United States Postal Service* v. *Brennan, supra,* 579 F.2d at 191. The principal consideration guiding the trial court's discretion is whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties. *Weisman* v. *Darneille, supra,* 89 F.R.D. at 52; *United States* v. *Columbia Pictures Industries, Inc.,* 88 F.R.D. 186, 189 (S.D.N.Y. 1980). Also important is the extent to which the proposed intervenor can be expected, by its participation in the action as a party, to shed light on the facts of the case that will be helpful to the Court in resolving the issues before it. *Barcia* v. *Sitkin,* 89 F.R.D. 382, 384 (S.D.N.Y. 1981).

There is no doubt that the Rule 24(b)(2) intervention sought by the movants is *permissible.* For the reasons set forth in note 3 *supra,* the Court finds that all the applicants for intervention acted in a "timely" fashion. Since all the applicants for intervention challenge the conduct of Superintendent Lewis in virtually identical fashion to the EEOC, their claims and the *Lewis* action have essentially *all* questions of law and fact in common.

However, the Court has not been persuaded that the Rule 24(b)(2) intervention sought by the movants should be *permitted.* As would be expected by virtue of the similarity between the movants' claims and the EEOC's claim, and as is evidenced by the near identity between the Moshowitz-Alexion-Clynes summary judgment motion and the summary judgment motion filed by the EEOC in the *Lewis* action, interjection of any or all of the proposed movants into the *Lewis* action would create an enormous duplication of effort on the plaintiffs' side of the *Lewis* action, while placing an unnecessary burden on Superintendent Lewis and the other defendants in responding to the additional motions, affidavits, and briefs that would inevitably be generated. While the proposed intervenors might possibly

shed additional light on certain issues before the Court in the *Lewis* action were they to be made parties thereto, it is unlikely, given the EEOC's expertise in the area, that the proposed intervenors would be of great assistance to the Court. Further, the Court is disposed to grant all of the proposed intervenors leave to participate in the *Lewis* action as *amici curiae. See Blowers* v. *Lawyers Co-operative Publishing Co., supra,* 527 F.2d at 334. On the basis of all these considerations, the Court declines to exercise its discretion to permit any of the applicants for intervention to intervene in the *Lewis* action pursuant to Rule 24(b)(2).

4. Conclusion. None of the applicants for intervention in the *Lewis* action has made the showing required by Rule 24(a)(1), Fed. R. Civ. P., Rule 24(a)(2), Fed. R. Civ. P., or Rule 24(b)(2), Fed. R. Civ. P. The Court therefore denies the motions of Moshowitz, Alexion, Clynes, the AAUP, and the ANA for leave to intervene in the *Lewis* action. However, the movants are granted leave to participate in the *Lewis* action as *amici curiae.* Since Moshowitz, Alexion, and Clynes have been denied leave to intervene in the *Lewis* action, the Moshowitz-Alexion-Clynes motion for summary judgment against Superintendent Lewis in the *Lewis* action is also denied.

D. The AAUP Motion to Intervene in the Spirt *Action*

The AAUP has moved, pursuant to Rules 24(a)(2) and 24(b)(2), Fed. R. Civ. P., for leave to intervene as a plaintiff in the *Spirt* action. It is important to note at the outset that the reason for the AAUP's desire to intervene in the *Spirt* action is entirely different from the rationale for the AAUP's motion for leave to intervene in the *Lewis* action. The AAUP sought leave to intervene in the *Lewis* action in order that it could challenge, in identical fashion to the EEOC's complaint in the *Lewis* action, the conduct of Superintendent Lewis in refusing to approve Unisex II. However, the AAUP seeks leave to intervene in the *Spirt* action in order that it can oppose the TIAA-CREF motion for partial relief from the *Spirt* judgment.

The Court has already set forth the four-part test that governs intervention as of right under Rule 24(a)(2). The first three parts of this test have undoubtedly been satisfied here by the AAUP with respect to the issue raised by the TIAA-CREF motion for relief from judgment. First, for the reasons set forth in the Court's discussion of the EEOC's motion for leave to intervene in the *Spirt* action, the AAUP's motion was made in "timely" fashion insofar as the AAUP seeks to oppose the TIAA-CREF motion for relief from judgment. Second, since the TIAA-CREF motion for relief from judgment directly threatens significantly to affect the amount of retirement benefits that members of the AAUP will be contractually entitled to receive on account of their past contributions to the TIAA and CREF plans, the AAUP claims a sufficient Rule 24(a)(2) interest relating to the issue raised by the TIAA-CREF motion for relief from judgment. *See New York Public Interest Research Group, Inc.* v. *Regents of the University of the State of New York, supra,* 516 F.2d at 352 (association has requisite Rule 24(a)(2) interest if some of its members have the requisite Rule 24(a)(2) interest and the association exists to protect that interest); *In re Penn Central Commercial Paper Litigation, supra,* 62 F.R.D. at 346 (interest that is significant, directly affected by challenged conduct, and legally protectable is sufficient to satisfy this portion of Rule 24(a)(2)). Third, since the Court's determination of the TIAA-CREF motion for relief from judgment could have a *stare decisis* effect that would negatively impact on the AAUP's hopes for success in other litigations on the issue raised by that motion, the AAUP is so situated that the Court's disposition of the TIAA-CREF motion for relief from judgment may impair or impede the AAUP's ability to protect the interest described above. *Foster* v. *Gueory, supra,* 655 F.2d at 1325; *New York Public Interest Research Group, Inc.* v. *Regents of the University of the State of New York, supra,* 516 F.2d at 352.

The Court also finds that the fourth prong of the Rule 24(a)(2) test has been satisfied with respect to the issue raised by the TIAA-CREF motion for relief from judgment. The EEOC has, of course, been granted leave to intervene in the

Spirt action in order to contest this very issue. In spite of this fact, the AAUP is only required, as the Court explained earlier in its discussion of the motions to intervene in the *Lewis* action, to show that its interest with respect to the issue raised by the TIAA-CREF motion for relief from judgment "may be" inadequately represented by the existing parties to the *Spirt* action. Since, as the Court points out in part III of today's opinion, the AAUP's position on the TIAA-CREF motion for relief from judgment is different from that advanced by any of the parties to the *Spirt* action, including the EEOC, the Court has little difficulty in concluding that the AAUP has shown the requisite possibility of inadequate representation by the existing parties on the issue raised by that motion. *See Adams* v. *Mathews,* 536 F.2d 417, 418 (D.C. Cir. 1976) (per curiam) (representation inadequate for purposes of Rule 24(a)(2) where none of the existing parties to the litigation support proposed intervenor's view of the applicable law). Accordingly, pursuant to Rule 24(a)(2), Fed. R. Civ. P., the AAUP is granted leave to intervene in the *Spirt* action with respect to the issue raised by the TIAA-CREF motion for relief from judgment.[7]

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7 The Court pauses to add that, if the AAUP were not entitled by Rule 24(a)(2) to intervene as of right with respect to the issue raised by the TIAA-CREF motion for partial relief from the *Spirt* judgment, the Court would grant the AAUP leave to intervene in this fashion pursuant to Rule 24(b)(2). Since the AAUP's application was timely filed, and since the AAUP's intervention would be for the purpose of contesting the precise question of law raised by the TIAA-CREF motion, intervention under Rule 24(b)(2) would, under the principles stated in connection with the Court's discussion of the motions to intervene in the *Lewis* action, unquestionably be *permissible.* Since, as the Court explained earlier in its discussion of the EEOC's motion for leave to intervene in the *Spirt* action, no undue delay or prejudice would flow from allowing the AAUP to intervene on this one issue, the Court would be acting in the proper exercise of its discretion were it to hold that such an intervention should be *permitted.*

The Court also adds that, while the AAUP has never filed an EEOC charge against any of the named defendants in the *Spirt* action, this fact imposes no barrier to the intervention granted by the Court. The AAUP's proposed intervention in the *Spirt* action presents a case where "the [proposed intervenor] has asserted claims of [sex] discrimination so similar to those asserted by the original plaintiff[ ] that no purpose would be served by

Notwithstanding its statement that it desires to intervene in the *Spirt* action only in order to oppose the TIAA-CREF motion for relief from judgment, the AAUP's motion for leave to intervene in the *Spirt* action seeks an order whereby the AAUP would become a plaintiff in the *Spirt* action for all purposes. The AAUP is not entitled by Rule 24(a)(2) to intervene in this broad fashion. First, since the AAUP moved to intervene approximately seven years after the *Spirt* action was commenced and approximately two years after a final judgment was entered in the *Spirt* action, and since allowance of the broad intervention sought by the AAUP would delay adjudication of and prejudice the existing parties to the *Spirt* action in the fashion described by the Court in its discussion of the EEOC's motion to intervene in the *Spirt* action, the Court finds that the AAUP's application to intervene was not timely filed insofar as it seeks an order granting the AAUP leave to intervene in the *Spirt* action for all purposes. *See Crown Financial Corp.* v. *Winthrop Lawrence Corp., supra*, 531 F.2d at 77 ("[i]ntervention after judgment is unusual and not often granted"); *Carey* v. *Klutznick, supra*, 88 F.R.D. at 250 (factors relevant to timeliness under Rule 24 include extent to which the suit has progressed and the length of time applicant for intervention knew of its interest in the suit before moving for leave to intervene); *United States* v. *International Business Machines Corp., supra*, 62 F.R.D. at 541-42 (most important factor to timeliness question under Rule 24 is whether delay in moving for intervention has prejudiced any of the existing parties). Second, with the exception of the interest implicated

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requiring [the proposed intervenor] to file independent [sex] discrimination charges with the EEOC." In such a case, the application to intervene should be judged by the criteria set forth in Rule 24, without imposing an additional exhaustion-of-administrative-remedies requirement. *Foster* v. *Gueory, supra*, 655 F.2d at 1323; *cf. Hodge* v. *McLean Trucking Co.*, 607 F.2d 1118, 1121 (5th Cir. 1979) (per curiam) (denying leave to intervene because proposed intervenors had not filed EEOC charges; however, *see Crawford* v. *United States Steel Corp., supra*, 660 F.2d at 665 n.7, original plaintiff had not filed EEOC charge either).

by the TIAA-CREF motion for relief from judgment, the AAUP has made no showing that it has an interest in any issue presently justiciable in the *Spirt* action that may be inadequately represented by the existing parties to the *Spirt* action.

Nor does Rule 24(b)(2) provide a basis for the Court to grant the AAUP leave to intervene in the *Spirt* action for all purposes. The Court has already set forth the standard for Rule 24(b)(2) intervention in its discussion of the motions to intervene in the *Lewis* action. Since, for the reasons just stated, the AAUP's application to intervene was not timely filed insofar as it seeks leave to intervene for all purposes, the Rule 24(b)(2) intervention sought by the AAUP is not *permissible*. Even if such intervention were permissible, the delay and prejudice that would, as the Court explained in its discussion of the EEOC's motion to intervene in the *Spirt* action, likely flow from an order allowing such intervention would prevent the Court from exercising its discretion to *permit* the AAUP to intervene for all purposes.

Accordingly, the AAUP's motion, pursuant to Rules 24(a)(2) and 24(b)(2), Fed. R. Civ. P., for leave to intervene in the *Spirt* action is granted in part and denied in part. The AAUP is granted leave to intervene as a plaintiff in the *Spirt* action only for the purpose of contesting the TIAA-CREF motion for partial relief from the *Spirt* judgment. With respect to the other issues pending before the Court in the *Spirt* action, the AAUP shall have leave to participate in the *Spirt* action as an *amicus curiae*. *See Blowers* v. *Lawyers Co-operative Publishing Co., supra*, 527 F.2d at 334.

II. Motions Relating to Spirt's Supplemental Complaint

Having emerged from its journey through the entire labyrinth of Rule 24 of the Federal Rules of Civil Procedure, the Court turns to the second of the three major topics that it deals with in today's opinion, namely, the motions filed in the *Spirt* action relating to Spirt's supplemental complaint. Spirt has filed a motion, pursuant to Rule 56, Fed. R. Civ. P., for summary judgment against Superintendent Lewis. TIAA and CREF, joined by Superintendent Lewis, have opposed this

motion and have cross-moved, pursuant to Rule 12(b)(6), Fed. R. Civ. P., for an order dismissing Spirt's supplemental complaint.

The Court must first deal with a somewhat unusual jurisdictional problem posed by Spirt's motion. By her motion, Spirt seeks (1) a declaratory judgment that Superintendent Lewis, in refusing to approve Unisex II, violated certain provisions of the federal constitution and of federal statutes; and (2) an order, on the basis of Superintendent Lewis' refusal to approve Unisex II, amending the *Spirt* judgment insofar as the Court thereby found that Spirt had failed to state a claim against TIAA and CREF under 42 U.S.C. § 1983 ("Section 1983"). The second aspect of the relief sought by Spirt is, in the Court's view, clearly not attainable via a Rule 56 motion against Superintendent Lewis. It might be argued that such an amendment of the *Spirt* judgment can be attained, on the theory that "it is no longer equitable that [this aspect of] the [*Spirt*] judgment should have prospective application," via a motion pursuant to Rule 60(b)(5), Fed. R. Civ. P. However, the quoted portion of Rule 60(b)(5) only supports a motion for relief from judgment if the movant contends that a *prospective* judgment of a court has been rendered inequitable by events *subsequent* to the court's entry of that judgment. 7 *Moore's Federal Practice* ¶ 60.26[4], at 334-39 (2d ed. 1979). Here, while Spirt's effort to persuade the Court to reconsider its prior ruling on Spirt's Section 1983 claims is based on an event subsequent to the *Spirt* judgment (namely, Superintendent Lewis' refusal to approve Unisex II), the Court did not make any prospective rulings with respect to Spirt's Section 1983 claims in the *Spirt* judgment. In the normal course, then, the proper means for Spirt to present her new Section 1983 theory would have been to commence an entirely new action against TIAA and CREF. However, the literal terms of the order of remand issued in the *Spirt* action by the Court of Appeals direct this Court to consider Spirt's new Section 1983 claim.[8]

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8 In its order of remand, the Court of Appeals directed, in relevant part, "[t]hat the [*Spirt*] action be remanded to the District Court for the

The Court accordingly deems Spirt's motion to rely on both Rule 56, Fed. R. Civ. P., and Rule 60(b)(5), Fed. R. Civ. P., and finds that the mandate issued in the *Spirt* action by the Court of Appeals provides any necessary jurisdictional basis for this Court to hear the Rule 60(b)(5) aspect of Spirt's motion.

The Court deals first with the Rule 56 aspect of Spirt's motion. Spirt, in her supplemental complaint, contends that Superintendent Lewis' refusal to approve Unisex II constituted a violation of (1) the equal protection clause of the fourteenth amendment to the United States Constitution, (2) Title VII, and (3) the Equal Pay Act. By the Rule 56 aspect of her motion, Spirt seeks a declaratory judgment to this effect and an injunction against future refusals of a similar kind. This aspect of the relief sought by Spirt's motion is virtually identical to the relief sought by the EEOC in the *Lewis* action. For the reasons that follow, the Court holds that the issue whether Superintendent Lewis violated Title VII by his disapproval of Unisex II is not justiciable in the context of the *Spirt* action.

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purpose of permitting an application for joinder of the Superintendent of Insurance of the State of New York to the action so as to permit consideration by the District Court of the issues relating to the Superintendent's action [in refusing to approve Unisex II]." As is explained in greater detail in text *infra*, Spirt's new claim that TIAA and CREF are liable under Section 1983 is "related" to Superintendent Lewis' refusal to approve Unisex II. Read literally, then, the mandate of the Court of Appeals clearly directs the Court to consider Spirt's new Section 1983 claim. (The Court also observes that the Court of Appeals based its order of remand on its view that Superintendent Lewis' refusal to approve Unisex II was "relevant to the issues involved [in the *Spirt* action] on appeal." Spirt's Section 1983 claim was, in the Court's view, the only issue before the Court of Appeals in the *Spirt* action that was even arguably implicated by Superintendent Lewis' disapproval of Unisex II.) The Court thus rejects the TIAA-CREF argument that the issue raised by Spirt's new Section 1983 claim is not an issue that the Court of Appeals remanded for this Court's consideration. TIAA and CREF have had ample opportunity, in the event they took this argument seriously, to petition the Court of Appeals for clarification of its mandate.

Both Unisex II and Unisex III deal with the problem of calculating the benefits to be received by plan participants from their future contributions to the TIAA and CREF plans. All parties and *amici* in both the *Spirt* action and the *Lewis* action agree that the Unisex II method of calculating such benefits fully complies with Title VII. Superintendent Lewis refused to approve Unisex II on the ground that it did not comply with the New York Insurance Law. Plainly, if Unisex III, which Superintendent Lewis did approve, complies with Title VII, then Superintendent Lewis has done nothing more than disapprove one Title VII-sufficient plan (Unisex II) and later approve a second Title VII-sufficient plan (Unisex III). In this event, there is no claim against Superintendent Lewis for the simple reason that, unless no other method is available, Title VII does not afford any victim of unlawful discrimination a right to a particular method of ending that discrimination. Thus, the claims against Superintendent Lewis in the *Lewis* action and the *Spirt* action hinge on the theory that Unisex III, unlike Unisex II, does not pass muster under Title VII, meaning that Superintendent Lewis, by his disapproval of Unisex II, has impeded compliance with Title VII by TIAA and CREF.

Therefore, the viability of any claim based on Superintendent Lewis' disapproval of Unisex II depends on whether Unisex III complies with Title VII. The question of the sufficiency of Unisex III under Title VII is the issue now being litigated in the *Lewis* action. *It is not, however, being litigated in the* Spirt *action.* Counsel for Spirt has stated that he sees no objection under Title VII to the use of Unisex III by TIAA and CREF to calculate the benefits to be received by plan participants from their future contributions to the TIAA and CREF plans. There is no article III case or controversy over an issue when the parties desire precisely the same result with respect to the issue. *GTE Sylvania, Inc.* v. *Consumers Union*, 445 U.S. 375, 383 (1980); *Moore* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 47, 48 (1971) (per curiam); L. Tribe, *American Constitutional Law* § 3-15, at 69 (1978). Since Spirt agrees with the TIAA-CREF-Superintendent Lewis position on the sufficiency of Unisex III under Title VII, the Court is

without power to adjudicate the Title VII-sufficiency of Unisex III in the context of the *Spirt* action. Since the lawfulness of Superintendent Lewis' refusal to approve Unisex II hinges on whether Unisex III passes muster under Title VII, the fact that the Title VII-sufficiency of Unisex III is not justiciable in the *Spirt* action means that the Court cannot, in the *Spirt* action, adjudicate the lawfulness of Superintendent Lewis' disapproval of Unisex II. Spirt's complaint must therefore be dismissed, insofar as it seeks declaratory or injunctive relief against Superintendent Lewis, on grounds of nonjusticiability.[9] This dismissal is, of course, without prejudice, on grounds of *res judicata*, collateral estoppel, "law of the case," or *stare decisis*, or under any other theory that counsel might one day proffer, to the similar claim presented against Superintendent Lewis by the EEOC in the *Lewis* action.

As noted, the Court has determined to interpret Spirt's Rule 56 motion to seek not only summary judgment against Superintendent Lewis but also a Rule 60(b)(5) amendment of the *Spirt* judgment. The Court now turns to the Rule 60(b)(5) aspect of Spirt's motion. In her supplemental complaint, Spirt alleges that Superintendent Lewis refused to approve Unisex II on account of its "unisex" feature, which feature Superintendent Lewis viewed to be in violation of the New York Insurance Law. Spirt has further alleged, in additional submissions to the Court, that Superintendent Lewis' understanding of the New

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9 The Court pauses to observe that, in holding that the issue of the lawfulness of Superintendent Lewis' disapproval of Unisex II is nonjusticiable, the Court has adopted the course apparently preferred by Spirt herself. In his final memorandum to the Court on the legal issues raised by Spirt's supplemental complaint, Spirt's counsel expressed the desire not to litigate any of the issues surrounding the Title VII-sufficiency of Unisex III or the lawfulness of Superintendent Lewis' disapproval of Unisex II, but rather to confine his effort to persuading the Court that Superintendent Lewis' disapproval of Unisex II was sufficient to convert the conduct of TIAA and CREF into state action for the purposes of Section 1983. *See* Plaintiff's Response Under the August 6, 1981 "Final" Filing Date, August 3, 1981, at 5-11. Thus, at least at the present time, Spirt apparently regards her supplemental complaint as directed against TIAA and CREF, not Superintendent Lewis.

York Insurance Law is such that he will disapprove any plan that adopts a "unisex" approach to calculating the benefits to be received by participants in the TIAA and CREF plans on account of their *past* contributions to those plans. In Spirt's view, the alleged conduct of Superintendent Lewis, by "compelling" the TIAA-CREF conduct of which Spirt complains, *see* Supplemental Complaint ¶ 11, converted the erstwhile "private action" of TIAA and CREF into "state action." On this basis Spirt argues that the *Spirt* judgment must be amended insofar as the Court thereby ruled that Spirt had failed to state a Section 1983 claim against TIAA and CREF because she had failed to allege "state action."

The Court believes that analysis of the Rule 60(b)(5) aspect of Spirt's motion is best begun by reviewing the Court's conclusion in *Spirt II* that Spirt had failed to state a Section 1983 claim against TIAA and CREF. Basically, the Court held that TIAA and CREF, being private entities, had not acted in a fashion such that their conduct could be deemed "state action," and thus that Spirt had failed to allege one of the necessary components of an equal protection claim under Section 1983. The Court recognized that action of a regulated entity such as TIAA or CREF may fairly be treated as action of the regulating state in a case where " 'there is a sufficiently close nexus between the [s]tate and the challenged action of the regulated entity.' " *Spirt II, supra*, 475 F. Supp. at 1311 (quoting *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974)). However, the Court failed to find the requisite nexus between the State of New York and the challenged action of TIAA and CREF, because it found nothing in the record to support a conclusion that the State of New York had compelled, or even fostered or encouraged, the alleged discrimination. *Spirt II, supra,* 475 F. Supp. at 1312-13 (citing *Moose Lodge 107* v. *Irvis*, 407 U.S. 163, 175-77 & n.3 (1972)).[10]

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10 The Court recognized, in *Spirt II,* that the state action question is probably governed by the former test, meaning that Spirt is probably required to show not merely that the State of New York "fostered or encouraged" the allegedly unlawful conduct, but instead that the State of

Analysis of the Rule 60(b)(5) aspect of Spirt's motion also requires a clear understanding of the TIAA-CREF conduct that Spirt alleges was in violation of the Constitution. When she originally filed her complaint in the *Spirt* action, Spirt challenged, on both federal constitutional and federal statutory grounds, that aspect of the then-operative TIAA and CREF retirement plans pursuant to which TIAA and CREF used sex-segregated mortality tables in calculating any benefits to be received by a participant in the plans. The Court held in *Spirt II*, and reiterates today, that CREF's use of such tables was unlawful under Title VII and that CREF must use sex-merged mortality tables in calculating the benefits to be received by plan participants who retire on or after May 1, 1980 ("deferred annuitants"), with respect to both their *future* contributions (*i.e.*, contributions made by deferred annuitants on or after May 1, 1980) and their *past* contributions (*i.e.*, contributions made by deferred annuitants before May 1, 1980). After entry of the *Spirt* judgment, TIAA and CREF determined, "for reasons of business exigency," to use sex-merged mortality tables with respect to *future* contributions by deferred annuitants, and to this end successively proposed to adopt Unisex I, Unisex II, and Unisex III, all of which were designed to accomplish this goal. However, TIAA and CREF decided not to adopt sex-merged mortality tables with respect to *past* contributions by deferred annuitants. Spirt does not challenge, on either a constitutional or a statutory basis, the conduct of TIAA and CREF in proposing to adopt the sex-merged mortal-

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New York "compelled" that conduct. 475 F. Supp. at 1312 (citing *Flagg Bros., Inc.* v. *Brooks*, 436 U.S. 149, 165 (1978)). Since the Court found that Spirt had not satisfied the less onerous fostered-or-encouraged standard, it was not required to determine which test actually governed the question. *Spirt II, supra*, 475 F. Supp. at 1312-13 nn.21-22. The Court reads the most recent decision on this issue by the Court of Appeals for this Circuit to support the view expressed by the Court in *Spirt II*. *See Jensen* v. *Farrell Lines, Inc.*, 625 F.2d 379, 387 (2d Cir. 1980), *cert. denied*, 450 U.S. 916 (1981). However, since Spirt has still failed to satisfy the fostered-or-encouraged standard, *see* text *infra*, the Court still need not decide whether this is actually the governing standard.

ity tables contained in Unisex I, Unisex II, or Unisex III. Thus, her constitutional claim against TIAA and CREF challenges two categories of TIAA-CREF conduct: (1) the original TIAA-CREF decision to use sex-segregated mortality tables in calculating any benefits to be received by a participant in the TIAA and CREF plans, and (2) the subsequent TIAA-CREF decision not to adopt sex-merged mortality tables in calculating the benefits to be received by deferred annuitants on the basis of their *past* contributions to the TIAA and CREF plans. Since the two categories of conduct just listed fully describe the TIAA-CREF conduct that Spirt alleges to have been unconstitutional, Spirt has only stated a Section 1983 claim against TIAA and CREF if some or all of the conduct described in these two categories was "state action." Under the principles set forth in *Spirt II*, there can be no finding that some or all of this conduct was "state action" unless Spirt has alleged facts from which the Court could find that the State of New York "compelled," or at a minimum "fostered or encouraged," some or all of this conduct. 475 F. Supp. at 1311-13.

In *Spirt II*, the Court rejected the proposition that Spirt had alleged facts from which the Court could find that the State of New York "compelled," or even "encouraged," the original TIAA-CREF decision to use sex-segregated mortality tables in calculating any benefits to be received by any participant in the TIAA and CREF plans. *See* 475 F. Supp. at 1312-13. Given that the events alleged in Spirt's supplemental complaint occurred *after* TIAA and CREF determined not to continue this conduct (but decided instead to use sex-merged mortality tables to calculate the benefits to be received by deferred annuitants on the basis of their future contributions), the events alleged in the supplemental complaint plainly afford the Court no new basis to find that the State of New York "compelled" or even "encouraged" this conduct. As a result, the allegations of Spirt's amended complaint are of assistance to her on the state action issue only if they provide a basis for the Court to find that the State of New York "compelled," or at a minimum "encouraged," the conduct in the second category listed above.

The Court sees no basis for holding, on the basis of the events alleged in the supplemental complaint and in Spirt's other submissions to the Court, that the State of New York "compelled" or even "encouraged" the TIAA-CREF decision not to adopt sex-merged mortality tables to calculate the benefits to be received by deferred annuitants on the basis of their past contributions to the TIAA and CREF plans. Spirt argues that Superintendent Lewis' disapproval of Unisex II somehow "compelled" or "encouraged" TIAA and CREF to continue to use sex-segregated mortality tables with respect to past contributions from deferred annuitants. The Court observes, however, that Unisex II had nothing whatever to do with past contributions from deferred annuitants, but was concerned only with deferred annuitants' *future* contributions. Further, the record demonstrates that Superintendent Lewis has repeatedly asserted that the New York Insurance Law does not bar "unisex" treatment of future contributions made to the TIAA and CREF plans by deferred annuitants, and that, in accord with this view, Superintendent Lewis has approved Unisex III, a plan that Spirt finds perfectly acceptable for the purpose of calculating the benefits to be received on the basis of future contributions made by deferred annuitants. Given these circumstances, the Court could not possibly interpret Superintendent Lewis' disapproval of Unisex II as having "compelled" or even "encouraged" the TIAA-CREF decision to continue to use sex-segregated mortality tables with respect to past contributions.

Spirt alleges that Superintendent Lewis views the New York Insurance Law to forbid the use of sex-merged mortality tables with respect to past contributions from deferred annuitants, but to permit the use of such tables with respect to future contributions from deferred annuitants. This allegation, if proven, would not provide a basis for the Court to hold that the State of New York "compelled" or even "encouraged" the TIAA-CREF decision not to adopt sex-merged mortality tables with respect to past contributions from deferred annuitants. Plainly, the TIAA-CREF decision to continue to use sex-segregated mortality tables with respect to past contributions from

deferred annuitants could only be found to have been "compelled," or even "encouraged," by Superintendent Lewis if there were some basis for finding that TIAA and CREF based their decision not to adopt sex-merged mortality tables with respect to past contributions from deferred annuitants on Superintendent Lewis' alleged interpretation of the New York Insurance Law. While there is some evidence in the record that TIAA and CREF *originally* adopted sex-segregated mortality tables on account of the New York Insurance Law, *see Spirt III, supra,* 475 F. Supp. at 1318; *Spirt II, supra,* 475 F. Supp. at 1312-13, Spirt has not alleged any facts from which the Court could find that TIAA and CREF, in proposing that future contributions from deferred annuitants be governed by sex-merged mortality tables while refusing to adopt sex-merged mortality tables with respect to past contributions from deferred annuitants, relied in doing so on Superintendent Lewis' alleged view that the New York Insurance Law permits a change to sex-merged mortality tables with respect to future contributions from deferred annuitants but forbids such a change with respect to past contributions from deferred annuitants.[11] Having failed to make such allegations, Spirt has

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11 Indeed, in the Court's view the record is clear that TIAA and CREF did not rely on Superintendent Lewis' interpretation of the New York Insurance Law in determining to distinguish between future contributions and past contributions from deferred annuitants. First, TIAA and CREF adopted this approach well before they became aware of Superintendent Lewis' apparent interpretation of the New York Insurance Law. Second, the Court is convinced, having supervised the *Spirt* action for approximately eight years and having had constant dealings with counsel for TIAA and CREF over the last three years, that TIAA and CREF have refused to use sex-merged mortality tables with respect to past contributions by deferred annuitants because of their deep, unshakeable beliefs that such a change would be unfair to male deferred annuitants and that Title VII does not require CREF to make such a change. TIAA and CREF made this argument to the Court in their original motions for summary judgment; CREF reiterated this argument in its motion for reargument after the Court granted Spirt's motion for summary judgment; TIAA and CREF make the argument again in their motion for partial relief from the *Spirt* judgment. Indeed, from all appearances, TIAA and CREF were utterly indifferent to the news that

alleged merely that Superintendent Lewis agrees with the TIAA-CREF decision to continue to use sex-segregated mortality tables with respect to past contributions from deferred annuitants, and has not alleged any sort of causal nexus between the view of Superintendent Lewis and the conduct of TIAA and CREF. The mere fact that a state regulatory agency approves of a regulated entity's action does not transmute the regulated entity's action into "state action." *Jackson* v. *Metropolitan Edison Co., supra,* 419 U.S. at 357.

Thus, the facts alleged by Spirt in her supplemental complaint and in her additional submissions to the Court would, if proven, be insufficient for the Court to find that the State of New York "compelled" or even "encouraged" either (1) the original TIAA-CREF decision to use sex-segregated mortality tables in calculating any benefits to be received by a participant in the TIAA and CREF plans or (2) the subsequent TIAA-CREF decision not to adopt sex-merged mortality tables in calculating the benefits that persons retiring on or after May 1, 1980, will receive on the basis of their contributions to the TIAA and CREF plans made before May 1, 1980. As a result, Spirt has failed to allege the "state action" that is a necessary component of a Section 1983 claim against TIAA and CREF.[12]

Superintendent Lewis had apparently concluded that the TIAA-CREF approach to deferred annuitants' past contributions is required by the New York Insurance Law. With all due respect to Superintendent Lewis, it appears that TIAA and CREF, like the Court, have been well aware throughout the litigation of the *Spirt* action that the question whether CREF is required to use sex-merged mortality tables with respect to past contributions by deferred annuitants is a question that will be decided purely on the basis of Title VII and that ultimately has nothing whatever to do with the New York Insurance Law or with Superintendent Lewis' interpretation of that law.

12 The Court is, of course, well aware of the line of cases where the requisite state action has been found merely by virtue of the plaintiff's allegation that the private defendant acted jointly with a state official named as a co-defendant. *See, e.g., Dennis* v. *Sparks,* 449 U.S. 24, 27-28 & n.4 (1980); *Lugar* v. *Edmondson Oil Co.,* 639 F.2d 1058, 1062-65 (4th Cir.) (en banc), *cert. granted,* 101 S.Ct. 3078 (1981). This line of cases was not

In the event the Court's September 18, 1979, judgment is affirmed on appeal, and Superintendent Lewis thereafter refuses to approve a CREF proposal to use sex-merged mortality tables to calculate the benefits that persons retiring on or after May 1, 1980, will receive on the basis of their contributions to the TIAA and CREF plans made before May 1, 1980, it would, of course, be open to Spirt to raise the state action issue once again by commencing a new Section 1983 action on the basis of these intervening events.

Accordingly, Spirt's motion is denied in its entirety. Insofar as this motion seeks summary judgment against Superintendent Lewis pursuant to Rule 56, Fed. R. Civ. P., it is denied because the issue whether Superintendent Lewis violated the federal constitution or any federal statute by his refusal to approve Unisex II is not justiciable in the context of the *Spirt* action. Insofar as this motion has been deemed to seek an amendment of the *Spirt* judgment pursuant to Rule 60(b)(5), Fed. R. Civ. P., it is denied because Spirt has not alleged facts from which the Court could find that the State of New York compelled or even encouraged any of the conduct by TIAA and CREF that Spirt contends was unconstitutional. The TIAA-CREF cross-motion to dismiss the supplemental complaint against Superintendent Lewis is granted. The denial of Spirt's motion insofar as it relies on Rule 56 and the grant of the TIAA-CREF cross-motion to dismiss are without preju-

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implicated at the time of the Court's decision in *Spirt II* because no state official was then named as a defendant in the *Spirt* action. Nor is it implicated now by the mere fact that Spirt has filed a supplemental complaint that names Superintendent Lewis as a supplemental defendant. Nowhere in her supplemental complaint does Spirt allege or complain of any joint conduct between Superintendent Lewis on the one hand and TIAA and CREF on the other. On the contrary, Spirt's claim against Superintendent Lewis is, as explained in text *supra*, based on conduct wholly distinct from her claim against TIAA and CREF. Thus, rather than arguing that TIAA and CREF have acted *in concert* with Superintendent Lewis, Spirt has based her state action argument entirely on the (untenable) theory that TIAA and CREF performed their challenged conduct in obedience to Superintendent Lewis' orders. *See* Supplemental Complaint ¶ 11.

dice, on grounds of *res judicata,* collateral estoppel, "law of the case," or *stare decisis,* or under any other theory that counsel might one day proffer, to the claims presented against Superintendent Lewis by the EEOC in the *Lewis* action.

III. The TIAA-CREF Motion for Relief from Judgment

The Court now turns to the third and final topic of today's opinion, namely, the TIAA-CREF motion, pursuant to Rule 60(b), Fed. R. Civ. P., for partial relief from the *Spirt* judgment. The Court begins its discussion of this motion, as it began its discussion of the motions relating to Spirt's supplemental complaint, by clearing the jurisdictional air. As the Court reads the TIAA-CREF motion papers, the only portion of Rule 60(b) on which this motion could even arguably be based is Rule 60(b)(5), Fed. R. Civ. P., on the theory that "it is no longer equitable that [a particular part of] the [*Spirt*] judgment should have prospective application." However, as noted in part II of today's opinion, this portion of Rule 60(b) only supports a motion for relief from judgment if the movant contends that a *prospective* judgment of a court has been rendered inequitable by events *subsequent* to the court's entry of that judgment. 7 *Moore's Federal Practice, supra,* ¶ 60.26[4], at 334-39. Here, the TIAA-CREF effort to persuade the Court to modify the *Spirt* judgment is not based on any event subsequent to entry of the *Spirt* judgment. Further, TIAA and CREF purport, by their motion, to attack only a *retrospective* aspect of the *Spirt* judgment. In the normal course, then the Court would have no jurisdiction to hear the TIAA-CREF motion. However, the order of remand issued in the *Spirt* action by the Court of Appeals directs this Court to consider the issue raised by the TIAA-CREF motion. The Court accordingly deems the TIAA-CREF motion to rely on Rule 60(b)(5), Fed. R. Civ. P., and finds that the mandate issued in the *Spirt* action by the Court of Appeals provides any necessary jurisdictional basis for this Court to hear the TIAA-CREF motion.

By their motion for relief from judgment, TIAA and CREF seek amendment of that part of the *Spirt* judgment that

requires CREF to use sex-merged mortality tables to calculate the benefits to be received by deferred annuitants on account of their contributions to the CREF plan made *prior to* May 1, 1980. TIAA and CREF argue that the "good-faith reliance defense," a defense not considered by the Court in *Spirt II* or *Spirt III,* is available in the *Spirt* action; they urge that, as a result of the availability of this defense, CREF should be permitted to use *sex-segregated* mortality tables with respect to contributions made by deferred annuitants prior to May 1, 1980. Spirt agrees that the good-faith reliance defense is available in the *Spirt* action, but believes that this fact necessitates amendment of the *Spirt* judgment only to permit CREF to use sex-segregated mortality tables with respect to contributions made by deferred annuitants prior to the decision of the United States Supreme Court in *City of Los Angeles* v. *Manhart,* 435 U.S. 702 (1978). LIU, the EEOC, and the AAUP all view the good-faith reliance defense to be wholly unavailable in the *Spirt* action, and consequently argue that this defense presents no basis for amendment of the *Spirt* judgment. These three parties take differing views, however, on the extent to which the *Spirt* judgment would have to be amended in the event the good-faith reliance defense *were* available in the *Spirt* action. LIU believes that the availability of this defense would necessitate amendment of the *Spirt* judgment to permit CREF to use sex-segregated mortality tables with respect to contributions made by deferred annuitants prior to this Court's decision in *Spirt II*; the AAUP states that the amendment of the *Spirt* judgment would only have to permit CREF to use sex-segregated mortality tables with respect to contributions made by deferred annuitants prior to the Supreme Court's decision in *City of Los Angeles* v. *Manhart, supra*; the EEOC argues that this amendment would only have to permit CREF to use sex-segregated mortality tables with respect to contributions made by deferred annuitants prior to the issuance, in 1972, of the EEOC's guidelines on the applicability of Title VII to educational institutions. In short, the parties to the *Spirt* action have presented the Court with five

different approaches to the issue raised by the TIAA-CREF motion for relief from judgment.

The TIAA-CREF motion for relief from judgment is based on two separate statutory provisions, one of which is contained in Title VII and the second of which is part of section 10 of the Portal-to-Portal Act.[13] The relevant portion of Title VII reads as follows:

> In any action or proceeding [under Title VII] based on any alleged unlawful employment practice, no person shall be subject to any liability or punishment for or on

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13 The TIAA-CREF theory that § 10 of the Portal-to-Portal Act can provide the basis for a defense to a Title VII action is as follows. Section 10 of the Portal-to-Portal Act provides, by its terms, a defense to an action under the Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-19. The Equal Pay Act, 29 U.S.C. § 206(d), is part of the Fair Labor Standards Act of 1938; thus, § 10 of the Portal-to-Portal Act provides a defense under the Equal Pay Act. Now, the so-called "Bennett Amendment" to Title VII, 42 U.S.C. § 2000e-2(h), provides that "[i]t shall not be an unlawful employment practice under [Title VII] for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of [the Equal Pay Act]." TIAA and CREF theorize that the defense provided by § 10 of the Portal-to-Portal Act is among the Equal Pay Act defenses incorporated into Title VII by the Bennett Amendment. In the Court's view, this interpretation is not at all supported by the statutory language (the defense afforded by § 10 of the Portal-to-Portal Act is not, as required by the Bennett Amendment, a defense "authorized by the provisions of" the Equal Pay Act, but rather is a defense "authorized by the provisions of" the Portal-to-Portal Act), and is seriously undercut by the Supreme Court's decision in *County of Washington* v. *Gunther,* 452 U.S. 161, ____, 101 S.Ct. 2242, 2249 (1981) (holding "that only differentials attributable to the four affirmative defenses of the Equal Pay Act are 'authorized' by that Act within the meaning of the Bennett Amendment"). *But see City of Los Angeles* v. *Manhart, supra,* 435 U.S. at 719-20 n.36 (citing § 10 of the Portal-to-Portal Act for the dictum that rulings of the Wage and Hour Administrator "provide a defense in [Title VII] sex discrimination cases"). Given the Court's holding that the defense provided by § 10 of the Portal-to-Portal Act is not available in the *Spirt* action even if it might be in some other Title VII action, the Court need not adjudicate the validity of the TIAA-CREF incorporation theory.

> account of (1) the commission by such person of an unlawful employment practice if he pleads and proves that the act or omission complained of was in good faith, in conformity with, and in reliance on any written interpretation or opinion of the Commission. . . . Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that (A) after such act or omission, such interpretation or opinion is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect. . . .

42 U.S.C. § 2000e-12(b). The relevant portion of section 10 of the Portal-to-Portal Act reads as follows:

> In any action or proceeding based on any act or omission on or after May 14, 1947, no employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended, . . . if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation, of the agency of the United States specified in subsection (b) of this section . . . . Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that after such act or omission, such administrative regulation, order, ruling, approval, interpretation, practice, or enforcement policy is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect.

29 U.S.C. § 259(a).

The language of these two sections is virtually identical. Each section provides, in essence, that no person "shall be subject to any liability or punishment for or on account of" any violation by such person of the statutory provisions to which the section applies, if such person "pleads and proves that the [discriminatory] act or omission complained of was

[committed] in good faith . . . reliance on" a written interpretation issued by the agency authorized to interpret the statutory provisions to which the section applies. For either of these sections to apply in the *Spirt* action, then, and thereby to provide the basis for the TIAA-CREF motion for partial relief from the *Spirt* judgment, two conditions must pertain: (1) the *Spirt* judgment must subject CREF to a liability or punishment on account of discriminatory acts committed by CREF *prior to* the entry of the *Spirt* judgment,[14] and (2) CREF must prove that it committed these discriminatory acts *in good faith reliance on* a written interpretation issued by the agency authorized to interpret the statutory provisions to which the section applies.

The first prong of this test has not been satisfied here, because the relief ordered by the *Spirt* judgment is not concerned with any unlawful acts committed by CREF prior to the entry of the *Spirt* judgment. As the Court clearly held in *Spirt II,* the CREF plan violates Title VII because it uses sex-segregated mortality tables to calculate the benefits to be received by plan participants on account of their contributions to the CREF plan. 475 F. Supp. at 1315. Under the CREF plan,

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14 In other words, the two sections relied upon by TIAA and CREF are triggered only by an action that seeks retroactive relief, that is, an action where the liability or punishment sought to be imposed on a person is in the nature of compensation for an allegedly unlawful act done in the past. Thus, the courts have consistently held that these two sections provide a defense only to an award of damages or back pay. *See Rosenfeld* v. *Southern Pacific Co.,* 519 F.2d 527, 529 (9th Cir. 1975) (under 42 U.S.C. § 2000e-12(b)); *Yott* v. *North American Rockwell Corp.,* 428 F. Supp. 763, 768 (C.D. Cal. 1977), *aff'd,* 602 F.2d 904 (9th Cir. 1979), *cert. denied,* 445 U.S. 928 (1980) (under 42 U.S.C. § 2000e-12(b)); *Northwestern-Hanna Fuel Co.* v. *McComb,* 166 F.2d 932, 939 (8th Cir. 1948) (under 29 U.S.C. § 259(a)). The Court rejects any argument that these two sections might be triggered by an action that seeks prospective relief, that is, an action where the liability or punishment sought to be imposed on a person is in the nature of prohibiting the commission of an allegedly unlawful act proposed to be done in the future. Were these two sections capable of being read this broadly, the good faith reliance defense would arguably preclude an award of any injunctive relief in the *Spirt* action at all.

nowever, CREF's unlawful use of sex-segregated mortality tables does not occur with respect to any particular plan participant until the day that the participant retires. *Id.* Prior to that day, the participant is treated in an entirely sex-neutral fashion by the plan: the contribution aspect of the plan is identical for men and women, *id.* at 1300; moreover, the plan does not promise that, on the day of the participant's retirement, any particular mortality tables will be used to calculate the benefits to which the participant is entitled, *id.* at 1316 n.28. Thus, when the Court entered the *Spirt* judgment on September 18, 1979, CREF had not, *in the past,* performed any unlawful discriminatory act with respect to any plan participant who would retire on or after May 1, 1980. The *Spirt* judgment thus did nothing more than order CREF not, *in the future,* to perform any unlawful act with respect to any plan participant who would retire on or after May 1, 1980. The *Spirt* judgment said nothing with respect to any other plan participant. Thus, the *Spirt* judgment does not subject CREF to a liability or punishment on account of any discriminatory acts committed by CREF *prior to* the entry of the *Spirt* judgment. Consequently, neither of the statutory sections relied upon by TIAA and CREF in support of their proffered good faith reliance defense is applicable in the *Spirt* action. The TIAA-CREF motion for partial relief from the *Spirt* judgment is accordingly denied.

CONCLUSION

The motions that are decided by today's opinion are disposed of as follows: (1) The EEOC's motion in 74 Civ. 1674(RJW) for leave to intervene in 74 Civ. 1674(RJW) is granted in part and denied in part. (2) The EEOC's motion in 74 Civ. 1674(RJW) for summary judgment against Superintendent Lewis is denied. (3) The EEOC's motion in 74 Civ. 1674(RJW) for an order consolidating 74 Civ. 1674(RJW) with 81 Civ. 881(RJW) for all purposes is denied. (4) The EEOC's motion in 81 Civ. 881(RJW) for an order consolidating 81 Civ.

881(RJW) with 74 Civ. 1674(RJW) for all purposes is denied. (5) The Moshowitz-Alexion-Clynes motion in 81 Civ. 881(RJW) for leave to intervene in 81 Civ. 881(RJW) is denied. (6) The Moshowitz-Alexion-Clynes motion in 81 Civ. 881(RJW) for summary judgment against Superintendent Lewis is denied. (7) The AAUP's motion in 81 Civ. 881(RJW) for leave to intervene in 81 Civ. 881(RJW) is denied. (8) The ANA's motion in 81 Civ. 881(RJW) for leave to intervene in 81 Civ. 881(RJW) is denied. (9) The AAUP's motion in 74 Civ. 1674(RJW) for leave to intervene in 74 Civ. 1674(RJW) is granted in part and denied in part. (10) Spirt's motion in 74 Civ. 1674(RJW) for summary judgment against Superintendent Lewis is denied. (11) The TIAA-CREF motion in 74 Civ. 1674(RJW) to dismiss Spirt's supplemental complaint is granted. (12) The TIAA-CREF motion in 74 Civ. 1674(RJW) for relief from the final judgment entered by the Court in 74 Civ. 1674(RJW) is denied.

The only pending motion in 74 Civ. 1674(RJW) or 81 Civ. 881(RJW) that is not decided by today's opinion is the EEOC's motion in 81 Civ. 881(RJW) for summary judgment against Superintendent Lewis. Superintendent Lewis shall serve and file his opposition to this motion within twenty (20) days of the date of this opinion. The other defendants in 81 Civ. 881(RJW) shall serve and file any comments they have on this motion within the same period of time. The EEOC, and *amici curiae* in 81 Civ. 881(RJW), shall have ten (10) days from the date such opposition is received to serve and file any reply papers they may wish to present.

It is so ordered.

Judgment of the Court of Appeals dated May 21, 1984

DIANA L. SPIRT,

Plaintiff-Appellant-Cross-Appellee,

—and—

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, and AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS,

Plaintiffs-Intervenors-Appellees,

—v.—

TEACHERS INSURANCE AND ANNUITY ASSOCIATION, COLLEGE RETIREMENT EQUITIES FUND, LONG ISLAND UNIVERSITY, and ALBERT B. LEWIS,

Defendants-Appellees-Cross-Appellants.

Nos. 79-7715, 79-7737, 79-7739

United States Court of Appeals,
Second Circuit

May 21, 1984

Present:

HON. JON O. NEWMAN,
HON. GEORGE C. PRATT,* *Circuit Judges*
HON. JOHN M. CANNELLA,** *District Judge*

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* Judge Pierce, who wrote the prior opinion in this case, 691 F.2d 1054, recused himself for reasons arising after the prior decision.

** The Honorable John M. Cannella of the United States District Court for the Southern District of New York, sitting by designation.

The action herein having been taken to the Supreme Court of the United States by Writ of Certiorari and a certified copy of the judgment of said court having been received and filed vacating the judgment of this court and remanding the said action to this court for further consideration in light of *Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans v. Norris*, 463 U.S. 1111 (1983), and the Judgment of this court having been vacated by order dated August 12, 1983.

UPON CONSIDERATION THEREOF, it is Ordered that the judgment of this court rendered September 29, 1982 be and it hereby is reinstated, subject only to the modification set forth in the opinion of this court.

Further ordered that the Judgment of the United States District Court for the Southern District of New York be and it hereby is affirmed as modified in accordance with the opinion of this court.

Elaine B. Goldsmith,
Clerk

By /s/ VICTORIA C. DALTON
VICTORIA C. DALTON
Deputy Clerk

Judgment of the Court of Appeals dated September 29, 1982

DIANA SPIRT,

Plaintiff-Appellant-Cross-Appellee,

—and—

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, and AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS,

Intervenors-Appellees,

—v.—

TEACHERS INSURANCE AND ANNUITY ASSOCIATION, COLLEGE RETIREMENT EQUITIES FUND, LONG ISLAND UNIVERSITY, and ALBERT B. LEWIS,

Defendants-Cross-Appellants-Appellees.

Nos. 79-7715, 79-7737, 79-7739

United States Court of Appeals,

Second Circuit

September 29, 1982

Present:

HON. JON O. NEWMAN,
HON. LAWRENCE W. PIERCE, *Circuit Judges,*
HON. JOHN M. CANNELLA, *District Judge.*

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed in part, reversed in part and the action be and it hereby is remanded to said district court for further proceedings in accordance with the opinion of this court.

A. Daniel Fusaro, Clerk

/S/ ARTHUR HELLER
by Arthur Heller,
Deputy Clerk

Order and Judgment of the District Court dated September 17, 1979

DIANA SPIRT,

Plaintiff,

—v.—

TEACHERS INSURANCE AND ANNUITY ASSOCIATION, COLLEGE RETIREMENT EQUITIES FUND, LONG ISLAND UNIVERSITY, and ALBERT B. LEWIS,

Defendants.

No. 74 Civ. 1674

United States District Court,

Southern District of New York

September 17, 1979

This cause having come on to be heard on motion of plaintiff Diana L. Spirt ("Spirt") and cross-motion of defendants Teachers Insurance and Annuity Association ("TIAA") and College Retirement Equities Fund ("CREF") for a summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure and the Court having considered the pleadings and prior proceedings in the action, the Stipulation of Facts of plaintiff and defendants TIAA and CREF dated April 21, 1977, as modified by the Stipulation of plaintiff Spirt and defendants TIAA and CREF, dated June 8, 1977, the affidavits of Kenneth D. Wallace, dated May 17, 1977 and June 6, 1977, the affidavit of Francis A. McGrath, dated May 13. 1977 and the affidavit of Ralph Munoz, dated March 17, 1977, all in support of plaintiff's motion and the affidavits of William C. Greenough, dated August 19, 1975, May 18, 1977 and June 28, 1978, the affidavits of Robert M. Duncan, dated August 19, 1975 and December 2, 1975 and the affidavit of Thomas Walsh dated June 8, 1977, all in support of defendants' cross-motion

and having found that there is no genuine issue of fact to be submitted to the trial court, and having concluded that plaintiff Spirt is entitled to judgment as a matter of law as to defendant CREF and defendant Long Island University ("LIU") and that defendant TIAA is entitled to a judgment as a matter of law, it is hereby

ORDERED, that plaintiff's motion for a summary judgment is granted as to CREF and denied as to TIAA, and it is further

ORDERED, that defendant CREF's motion for a summary judgment is denied, and it is further

ORDERED, that defendant TIAA's motion for a summary judgment is granted and the action against it be and the same hereby is dismissed, and it is further

ORDERED, ADJUDGED AND DECREED that defendant CREF be, and it hereby is permanently enjoined and restrained on and after May 1, 1980 from violating the provisions of Section 703(a)(1) of the Civil Rights Act of 1964, as amended, [42 U.S.C. § 2000e-2(1)] hereinafter called the Act, by using sex-based mortality tables in calculating the number of annuity units to which plaintiff and its other deferred annuitants are entitled under its variable annuity plans, and it is further

ORDERED, ADJUDGED AND DECREED that defendant LIU be and it hereby is permanently enjoined and restrained on and after June 1, 1980 from violating the provisions of Section 703(a)(1) of the Act in any of the following manners: LIU shall not make contributions on behalf of its employees or require its employees to contribute to any retirement plan that uses sex-based mortality tables in calculating periodic benefits, and it is further

ORDERED, that the time to make any application for attorney's fees be and the same hereby is extended until thirty (30) days after the time to file an appeal from this Order and Judgment or, in the event of an appeal, until thirty (30) days after the mandate on remand.

Dated: September 17, 1979

/S/ ROBERT J. WARD
United States District Judge

Order and Judgment of the Supreme Court dated July 6, 1984

TEACHERS INSURANCE AND ANNUITY ASSOCIATION, *et al.*,

Petitioners,

—v.—

DIANA L. SPIRT, *et al.*,

—and—

LONG ISLAND UNIVERSITY,

Petitioner,

—v.—

DIANA L. SPIRT, *et al.*,

Nos. 82-791 and 82-913

Supreme Court of the United States

July 6, 1984

ON WRITS OF CERTIORARI to the United States Court of Appeals for the Second Circuit.

THESE CAUSES having been submitted on the petitions for writs of certiorari and responses thereto.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the judgment of the above court in these causes is vacated with costs, and that these causes are re-

manded to the United States Court of Appeals for the Second Circuit for further consideration in light of *Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans* v. *Norris,* 463 U.S. ____ (1983).

IT IS FURTHER ORDERED that the petitioners, Teachers Insurance and Annuity Association, et al. and Long Island University, recover from Diana L. Spirt, et al. Four Hundred Dollars ($400.00) for their costs herein expended.

Opinion of the Sixth Circuit
in *Peters* v. *Wayne State University*

MILDRED PETERS, et al.,

Plaintiffs-Appellees,

—v.—

WAYNE STATE UNIVERSITY (79-1670), TEACHERS INSURANCE AND ANNUITY ASSOCIATION AND COLLEGE RETIREMENT EQUITIES FUND (79-1658, 79-1671),

Defendants-Appellants.

Nos. 79-1658, 79-1670, 79-1671

United States Court of Appeals,
Sixth Circuit

October 14, 1982

Before:

MARTIN, *Circuit Judge*;
PHILLIPS and BROWN*, *Senior Circuit Judges*.

BOYCE F. MARTIN, JR., *Circuit Judge*

This case requires us to decide whether Title VII prohibits an insurance company from operating or an employer from selecting a retirement benefits plan under which the size of monthly annuity payments is calculated from sex-segregated mortality tables. Wayne State University offers its faculty and certain other employees an annuity pension plan administered by

* Circuit Judge Brown retired from regular active service under the provisions of 28 U.S.C. § 371(b) on June 16, 1982, and became a Senior Circuit Judge.

Teachers Insurance and Annuity Association and the College Retirement Equities Fund. Under this plan, female annuitants receive smaller monthly payments than similarly situated male annuitants. This distinction is based on the actuarial probability that women will live longer than their male counterparts.

The plaintiffs, female employees of Wayne State, brought this sex discrimination action in the District Court for the Eastern District of Michigan. The District Court found that both Teachers Annuity and Wayne State had violated section 703(a) of Title VII of the Civil Rights Act of 1964. 42 U.S.C. § 2000e-2(a). *Peters v. Wayne State University*, 476 F.Supp. 1343 (E.D. Mich. 1979). We disagree and reverse.

Wayne State is a state-supported university located in Detroit, Michigan. Teachers Annuity is a pair of companies designed specifically to serve the unique retirement needs of academic employees. Teachers Insurance and Annuity Association is a legal reserve life insurance company; College Retirement Equities Fund is a companion corporation organized to provide a greater variety of insurance services. Teachers Annuity enables employees of academic institutions to move from one institution to another because the employees take their personal retirement contracts with them as they move. Five hundred fifty thousand employees at over three thousand institutions contract directly with Teachers Annuity for retirement annuity benefits.

Wayne State does not require its employees to participate in the Teachers Annuity retirement plan. Employees who choose to do so contribute to the fund five percent of their salaries matched by a ten percent Wayne State contribution. Each contribution automatically purchases retirement benefits which vest immediately and irrevocably in the individual employee. At retirement, employees must select among several annuity payment options.

If a woman selects a "single life option," which provides monthly payments for life, she will receive smaller payments than a man of the same age and accumulated contributions. Teachers Annuity computes the annuities from standard mor-

tality tables which reflect the fact that, as groups, women live longer than men. At age sixty-five a woman's life expectancy is four years longer than a man's. To compensate for women's longevity, female annuitants receive smaller monthly payments. However, the present actuarial values of women's and men's benefits are identical.

The District Court found that both Teachers Annuity and Wayne State violated Title VII. Although women and men *as groups* received equal benefits, the District Court relied on *City of Los Angeles v. Manhart*, 435 U.S. 702 (1978), to find that the retirement plan discriminated against the *individual* female annuitant.

Section 703(a) provides in pertinent part:

> (a) It shall be an unlawful employment practice for an *employer*—
>
> (1) to . . . discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of . . . sex . . . .

78 Stat. 255, 42 U.S.C. § 2000e-2(a)(1) (emphasis added). Federal courts have construed the statutory language to include, as employers, employers' agents and those to whom employers have delegated responsibility for employee compensation. As the Supreme Court noted in *Manhart*, "[A]n employer can[not] avoid his responsibilities by delegating discriminatory programs to corporate shells. Title VII applies to 'any agent' of a covered employer . . . ." 435 U.S. at 718, n.33.

In the present case, the District Court found that Teachers Annuity was an "employer" within the meaning of Title VII because "[t]he ties between WSU and TIAA/CREF are too great to allow them each to deny liability on account of the actions of the other." 476 F. Supp. at 1350. The court emphasized the fact that Teachers Annuity's "sole reason" for existence was to provide individually vested insurance contracts to employees of educational institutions.

The District Court's characterization of Teachers Annuity as an "employer" is clearly erroneous. Fed. R. Ap. P. 52(a). Obviously Teachers Annuity does not "employ" the plaintiffs in the conventional sense of the word. Neither does Wayne State retain Teachers Annuity as an agent or delegate to it any aspect of employee compensation. *See Los Angeles v. Manhart*. On the contrary, Wayne State determines the eligibility requirements for participation in the Teachers Annuity plans and sets the contribution levels for itself and its employees. Teachers Annuity's responsibility is limited to management of the retirement fund and disbursement of individual annuities. Furthermore, Wayne State exercises no control over Teachers Annuity, otherwise essential to a principal agent relationship. *NLRB v. Local No. 64, Falls Cities District Council of Carpenters, United Brotherhood of Carpenters and Joiners of America, AFL-CIO*, 497 F.2d 1335, 1366 (6th Cir. 1974). *See generally* 2A C.J.S. Agency § 6; Restatement (Second) Agency § 14. Wayne State cannot control Teachers Annuity's administrative policies once its employees decide to join the Teachers Annuity plan. Indeed, the decision to use sex-segregated mortality tables to compute annuity payments was Teachers Annuity's alone. Wayne State has repeatedly and unsuccessfully attempted to persuade Teachers Annuity to alter its payment policy.

Teachers Annuity is not an "employer" for the purposes of Title VII; Wayne State has selected Teachers Annuity's retirement planning services for its employees. Teachers Annuity is an insurance company providing a service to Wayne State and Wayne State's employees. *Manhart* expressly held, "[Title VII] was not intended to revolutionize the insurance and pension industries." 435 U.S. at 717. We decline to hold that an insurance company may become liable under Title VII simply by furnishing its services to a Title VII employer.

An insurance company is not bound by Title VII because it furnishes its services to a Title VII employer. The reverse is not true. A Title VII employer cannot avoid its liabilities under the statute by claiming it has selected services which "happen" to

discriminate against women. Wayne State emphasizes that Teachers Annuity's acts are lawful, that Teachers Annuity contracts directly with Wayne State employees, and that Wayne State's role is primarily administrative rather than policy-making. None of these facts relieves Wayne State of responsibility for *choosing* Teachers Annuity's retirement plan for its employees. Accordingly, Wayne State would be liable under Title VII if Teachers Annuity's plan discriminated against female annuitants. We hold, however, that the use of sex-segregated mortality tables to calculate retirement annuities does not violate Title VII if the actuarial value of the annuities is equal for similarly situated women and men.

"It is well established under Title VII that claims of employment discrimination . . . may arise in two different ways." *Furnco Construction Co. v. Waters*, 438 U.S. 567, 581-582 (1978) (Marshall concurring in part and dissenting in part). The plaintiff must show either "disparate treatment" or "disparate impact." "The central focus of the inquiry . . . is always whether the employer is treating 'some people less favorably than others *because of* their . . . sex.' " *Id.* at 577 (emphasis added) *citing International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335 n. 15 (1977).

The District Court determined that Wayne State had violated Title VII without first finding either "disparate treatment" of women by Wayne State or a "disparate impact" on women of a Wayne State policy. Rather, the court relied *solely* on the holdings and dicta of *Manhart. Peters*, 476 F. Supp. at 1349. *See also Spirit v. TIAACREF*, Nos. 79-7715, 7737, and 7739 (2d Cir. decided Sept. 29, 1982); *EEOC v. Colby College*, 589 F.2d 1139 1st Cir. 1978). Careful analysis of Wayne State's actions reveals neither disparate treatment nor disparate impact. In short, there is no evidence that Wayne State treats women less favorably than men *because of* their sex.

Disparate treatment occurs when an employer bases employment decisions on an impermissible criterion, such as sex. An employer need not treat women and men in exactly the same manner. Title VII merely forbids the employer from acting

with the intent to discriminate. *Furnco Construction Co. v. Waters*, 438 U.S. at 579-580. *See also Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981).

The Supreme Court has repeatedly discussed the proof requirements in disparate treatment cases. The plaintiff has the initial burden of showing that the employer's practices, "otherwise unexplained, are more likely than not" impermissibly motivated. *Id.* at 254, *citing Furnco*, 438 U.S. at 577. After the plaintiff has made out a prima facie case, the defendant has the opportunity to rebut the presumption of discrimination by showing a "legitimate non-discriminatory reason" for its decision. *Burdine*, 450 U.S. at 254; *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). Finally, the plaintiff has the opportunity to show that the defendant's "reason" is a pretext to mask a discriminatory decision. *McDonnell Douglas*, 411 U.S. at 804. In all cases, the plaintiff retains the ultimate burden of persuading the trier of fact that the employer intentionally discriminated. *Burdine*, 450 U.S. at 256.

In the present case, Wayne State's retirement plan differentiates between women and men. Female annuitants receive smaller monthly payments than similarly situated male annuitants. Wayne State rebutted this prima facie showing of disparate treatment by articulating a legitimate non-discriminatory reason for treating female and male annuitants differently. Sex-segregated mortality tables are used to calculate payments according to accepted actuarial practices; the tables are sex-segregated simply because women live longer than men. Women receive smaller annuities over a longer period of time to ensure that the value of the retirement plan for women and men is equal.

Plaintiffs failed to carry their ultimate burden of persuasion under the *Burdine* analysis. They did not demonstrate at trial that Wayne State's motivation was discriminatory or improper in any way. Plaintiffs did not show that Wayne State's reliance on longevity to calculate benefits was a pretext to mask its intention to disadvantage and harm female annuitants. Wayne

State has not violated Title VII according to a disparate treatment analysis.

Neither has Wayne State violated Title VII according to a disparate impact analysis. A disparate impact occurs when an employer's facially neutral policy burdens one class more than another. "[P]ractices that are fair in form, but discriminatory in operation" produce a "disparate impact." *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971). *See also Dothard v. Rawlinson*, 433 U.S. 321 (1977); *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977). To defend against a claim of disparate impact, an employer must show that its practice is necessarily and closely related to a business purpose. *Griggs*, 401 U.S. at 431.

Plaintiffs in this case claim that Wayne State's retirement plan has a disparate impact on women because women receive smaller monthly annuity payments than men. Plaintiffs focus on one fact, that the monthly checks received by women and men differ; they disregard all other aspects of the retirement plan. The District Court's focus and conclusion agreed with the plaintiffs'. "[T]he use of separate mortality tables . . . is discriminatory as applied to an individual woman annuitant." 476 F. Supp. at 1349. Both the District Court and the plaintiffs rely solely on *Los Angeles v. Manhart* for the proposition that "employer pension plans must be non-discriminatory on an individual basis, rather than on class basis." *Id.*

In *Manhart* the Supreme Court invalidated Los Angeles' retirement programs because the city required women to contribute more than men to receive equal retirement benefits. The difference in contribution rates stemmed from standard mortality tables reflecting the fact that women as a group live longer than men as a group. The city deducted the contributions directly from all employees' paychecks. The Court acknowledged the validity of the mortality tables but declared that Title VII protects *individuals*, not groups. The Court found the city liable for sex discrimination against each individual woman who received less take-home pay than a man for the same job.

Two significant factual differences exist between *Manhart* and the present case. In *Manhart* the employer deducted retirement contributions at different rates from employees' paychecks. Because women were required to contribute more than men, women effectively earned less money than men for the same jobs. Women and men employees at Wayne State contribute the same amount to the retirement plan. Consequently they receive equal compensation. Furthermore, in *Manhart* the employer operated the pension fund. The city collected the contributions, managed the accumulated money, and calculated the disbursement rates. Wayne State does not operate the pension fund for its employees. Rather Teachers Annuity, an independent insurance company, manages the accumulated money in the individual accounts and calculates the disbursement rates.

These factual differences are significant because the Supreme Court expressly limited its *Manhart* holding along these lines: "All that is at issue today is a requirement that men and women make *unequal contributions* to an *employer-operated* pension fund." 435 U.S. at 717 (emphasis added). The Court's primary concern, that women received smaller paychecks for the same work, is not a factor in the present case.

Two landmark industrial benefits cases preceded *Manhart*, *General Electric Co.* v. *Gilbert*, 429 U.S. 125 (1976), *reh. denied*, 429 U.S. 1079 (1977), and *Geduldig v. Aiello*, 417 U.S. 484 (1974). In both these cases the employer offered a disability benefits plan which excluded pregnancy as a disability. The Supreme Court found no sex discrimination under Title VII, in *Gilbert*, or under the Equal Protection Clause, in *Geduldig*. The plaintiffs failed to demonstrate either disparate treatment or a disparate impact from the exclusion of pregnancy as a disability.

Like *Gilbert* and *Geduldig*, the present case concerns a benefit plan, not employee wages. In all three cases, the employers paid or required equal contributions for both women and men. Justice Rehnquist's analysis in *Gilbert* quoting *Geduldig* controls the present case:

> As in Geduldig, we start from the indisputable baseline that "[t]he fiscal and actuarial benefits of the program . . . accrue to members of both sexes," 417 U.S., at 497 n.20.
>
> * * *
>
> The "package" going to relevant identifiable groups we are presently concerned with—General Electric's male and female employees—covers exactly the same categories of risk, and is facially nondiscriminatory in the sense that "[t]here is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not." Id., at 496-497 . . . .
>
> As there is *no proof that the package is in fact worth more to men than to women, it is impossible to find any gender-based discriminatory effect in this scheme.*

429 U.S. at 138-139 (citations and footnotes omitted) (emphasis added). For the same reasons we hold that Wayne State's retirement benefits package which offers female and male annuitants benefits of equal value does not violate Title VII. The retirement plan is not worth more to men than to women.

Common sense supports this holding. Plaintiffs point out that individual women may not live to the predicted statistical age of death and, therefore, may not recover the full actuarial value of their retirement packages. This argument is equally true for men. After death the total benefits received could be calculated to determine whether a man or a woman has received more money. But because annuity payments must be calculated prior to death, insurers and employers must use the only tools available to calculate payments, mortality tables. Both women and men may not live to the predicted statistical age but both women and men have the *same probability* of living to the predicted statistical age.

Gender neutral tables would not "equalize" the treatment of women and men. If annuities were calculated on gender neutral tables, women and men would receive equal payments. However, Wayne State would have to contribute more to a

woman's retirement fund than to a man's. Consequently men would receive less immediate compensation. Furthermore, women living to the predicted statistical age for women would receive greater total benefits than men living to the predicted statistical age for men.

The retirement plan which Wayne State offers its employees differentiates between women and men on the basis of longevity solely. Wayne State's selection of a retirement plan which calculates annuities from sex-segregated mortality tables is not the "kind of 'artificial, arbitrary and unnecessary barrier to employment' which the Court found to be the intention of Congress to remove." *McDonnell Douglas*, 411 U.S. at 806, *quoting Griggs*, 401 U.S. at 431. It is not a "built-in headwind" unrelated to an individual's longevity because longevity cannot be measured on an individual basis. We conclude that Wayne State has not violated Title VII by providing women and men equal retirement annuity benefits with different disbursement rates.

Because our decision on the issue of Title VII liability disposes of the case, we need not address the other issues raised by the parties.

The decision of the District Court is reversed.

The McCarran-Ferguson Act, Sections 1 and 2;
15 U.S.C. §§ 1011, 1012 (1982)

Section 1 (15 U.S.C. § 1011):

> Congress declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

Section 2 (15 U.S.C. § 1012):

> (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.
>
> (b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: Provided, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

Title VII of the Civil Rights Act of 1964, Sections 703(a)(1), 706(g) and 713(b); 42 U.S.C. §§ 2000e-2(a)(1), 5(g), and 12(b) (1982):

Section 703(a)(1) (42 U.S.C. § 2000e-2(a)(1)):

> (a) It shall be an unlawful employment practice for an employer—
>
> > (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin;

Section 706(g) (42 U.S.C. § 2000e-5(g)):

> (g) . . . Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. . . .

Section 713(b) (42 U.S.C. § 2000e-12(b)):

> (b) In any action or proceeding based on any alleged unlawful employment practice, no person shall be subject to any liability or punishment for or on account of (1) the commission by such person of an unlawful employment practice if he pleads and proves that the act or omission complained of was in good faith, in conformity with, and in reliance on any written interpretation or opinion of the Commission, or (2) the failure of such person to publish and file any information required by any provision of this subchapter if he pleads and proves that he failed to publish and file such information in good faith, in conformity with the instructions of the Commission issued under this subchapter regarding the filing of such information. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that (A) after such act or omission, such interpretation or opinion is modified or rescinded or is determined by judicial author-

ity to be invalid or of no legal effect, or (B) after publishing or filing the description and annual reports, such publication or filing is determined by judicial authority not to be in conformity with the requirements of this subchapter.

Portal-to-Portal Act, 29 U.S.C. § 259 (1982):

(a) In any action or proceeding based on any act or omission on or after May 14, 1947, no employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act, if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation, of the agency of the United States specified in subsection (b) of this section, or any administrative practice or enforcement policy of such agency with respect to the class of employers to which he belonged. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that after such act or omission, such administrative regulation, order, ruling, approval, interpretation, practice, or enforcement policy is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect.

(b) The agency referred to in subsection (a) of this section shall be—

(1) in the case of the Fair Labor Standards Act of 1938, as amended—the Administrator of the Wage and Hour Division of the Department of Labor; . . . .

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No. 84-50

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

TEACHERS INSURANCE AND ANNUITY ASSOCIATION *et al.*,
Petitioners,

v.

DIANA SPIRT *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENT AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS IN OPPOSITION

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QUESTIONS PRESENTED

1. Was the order of the court below requiring the petitioners to determine periodic pension benefits on a sex-neutral basis for male and female employees retiring after May 1, 1980, consistent with the equitable remedial principles elucidated by this Court in *Arizona Governing Committee v. Norris*, 463 U.S. ——, 103 S.Ct. 3492 (1983) (per curiam)?

2. In light of the reasons for which the petitioners were established as educational service organizations, the close mutual dependence between the petitioners and participating educational institutions, and the broad remedial purposes for which Congress enacted Title VII of the Civil Rights Act of 1964, did the court below correctly determine that the petitioners were subject to the nondiscrimination provisions in Section 703(a)(1) of that Act?

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IN THE

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Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR RESPONDENT AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS IN OPPOSITION

The American Association of University Professors ("AAUP"), respondent in this Court, respectfully urges that the petition for writ of certiorari filed by the Teachers Insurance and Annuity Association and the College Retirement Equities Fund (respectively "TIAA" and "CREF" and collectively "TIAA-CREF") be denied.

STATEMENT OF THE CASE

In two respects, the petitioners' statement calls for supplementation.

A. *The Cost and Practical Effect of the Remedy Ordered by the Courts Below.* The petition exaggerates the practical ramifications of the remedy fashioned by the trial and appellate courts below.

Those courts enjoined TIAA-CREF from using gender-based mortality tables to calculate annuity benefits for any plan participant retiring after May 1, 1980.[1] The petition asserts that the implementation of this remedy will mean a "reduction in men's benefits" of as much as eight percent a month,[2] a result the petitioners call "staggering."[3] Yet, as the court below correctly observed, the remedy will have no negative impact on the retirement benefits of the three-fifths of all male participants who have elected the joint-life option and whose annuity payments have long been calculated using the functional equivalent of sex-neutral mortality tables.[4] As for the minority of male participants who elect the single-life option, data contained in the record show that TIAA-CREF could painlessly comply with the remedial order and equalize benefits for men and women retiring after May 1, 1980, simply by reallocating a miniscule fraction —something less than two percent—of the four hundred million dollars of discretionary dividend income earned by TIAA-CREF each year.[5] This reallocation could occur

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[1] That date was selected because it was the approximate end of the 1979-80 academic year. The trial court's decision was rendered on August 9, 1979, but was stayed "until the termination of the 1979-80 academic year" in order to give TIAA-CREF time to recompute annuity units on a sex-neutral basis. Pet. App. 88a. (As used in this footnote and hereinafter, the abbreviation "Pet." refers to the petition for certiorari filed by TIAA-CREF in this Court; the abbreviation "Pet. App." refers to the appendix accompanying the petition for certiorari; and the abbreviation "J.A." refers to the Joint Appendix submitted by the parties in the court below.)

[2] Pet. 14, 15.

[3] Pet. 14.

[4] Pet. App. 6a. The record, in fact, supports an even broader conclusion: for most men, the adoption of merged-gender mortality tables will actually *increase* their monthly retirement benefit. *See* J.A. 550, 590, 592.

[5] *See* J.A. 587-93.

without imposing any additional financial burden on either TIAA-CREF or the colleges and universities that have adopted TIAA-CREF retirement plans.

It is this concept of *discretionary dividend income* that distinguishes the TIAA-CREF plan from other pension plans. Unlike many other pension plan operators offering fixed-dollar annuities, TIAA-CREF makes no contractual commitment to its participants to invest contributions at a rate of return approximating the market rate. Instead, TIAA-CREF guarantees only that benefit levels will reflect a minimum two and a half percent return on investment.[6] Because TIAA-CREF can invest participant contributions at an interest rate substantially in excess of the contractual guarantee, TIAA-CREF earns enormous sums each year in discretionary interest income. Most of this income is normally returned to participants in the form of additional investment dividends. TIAA-CREF participants hope that their investments will earn income at something approximating market rates, but they have no entitlement to premiums beyond the extremely modest contractual minimum.

During their working years, TIAA-CREF participants do not know what their monthly benefits will be after retirement. It is not *until* retirement, when the participant's contract with TIAA is "settled" and converted into a life annuity, that he or she is first guaranteed a fixed-dollar retirement benefit and the amount of the benefit is actually calculated.[7] TIAA cautions participants that

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[6] Pet. App. 35a. *See* J.A. 197.

[7] Pet. App. 15a. This distinctive feature of the TIAA-CREF retirement plan is an important factual predicate for the remedy fashioned by the trial court and court of appeals in this case. During a faculty member's worklife, amounts contributed by the employer and matching amounts, if any, paid by the employee are credited to an individual account maintained in the faculty member's name by TIAA-CREF. The amount of the employer's contribution is determined formulaically. For example, Long Island University, which employs the plaintiff in this action, contributes

it cannot accurately predict the amount of retirement income an individual participant should expect:

> The amount of your retirement income will depend on the number of years you participate in the plan, the amount of premiums paid each year during your participation, your age at time of retirement, the experience of TIAA and CREF, the income option you select at retirement, and other factors. . . . [I]t is not possible to predict the effect of each of these factors upon your retirement income. . . .[8]

Thus, TIAA-CREF misspeaks when it asserts that "benefits, previously vested, will be lost" by male participants under the remedy fashioned by the courts below.[9] The only entitlement that "vests" during a participant's worklife is an ownership interest in *some* benefit, the precise amount to be determined upon retirement. As the court below observed:

> [W]e must reject the argument that an award of relief that adversely affects the value of contributions made by or on behalf of male employees prior to the date of the order herein will unfairly violate those males' expectations of receiving pension benefits based on mortality tables that discriminate in

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five percent of the first $4,800 of a professor's salary and eleven percent of all earnings in excess of $4,800 (Pet. App. 14a.) There is no discrimination against female faculty members in this first, or "pay-in," phase of the TIAA-CREF plan; a man and woman of the same age with identical employment histories will have accumulated the same amounts in their individual accounts by the time they reach retirement age. (Pet. 4; *see* J.A. 175.)

The discrimination occurs only when the faculty member retires, and it continues throughout the second, or "pay-out," phase, when sex-distinct mortality tables are used to convert the faculty member's accumulation into a life annuity. It is at this stage that female retirees are first treated differently than comparably situated males; females receive smaller monthly benefits. (Pet. App. 14a-16a, 85a-86a.)

[8] J.A. 233, cited and quoted by the court below at Pet. App. 34a-35a.

[9] Pet. 14.

> their favor. . . . [T]his argument assumes that male employees had some *clearly settled* expectations that *will be* violated. On the contrary, the literature distributed to TIAA-CREF participants emphasizes the difficulty involved in accurately predicting the amount of retirement annuity income to be expected by an individual participant. . . . While TIAA does guarantee its participants certain minimal monthly payments, the amounts guaranteed are so low—since they are figured on the basis of a 2½% return on investments—that there is no danger that the male participants' expectation that they will receive the minimal guaranteed benefit will be jeopardized by the relatively minor changes in the value of past benefits necessitated by the relief ordered herein.[10]

In sum, the majority of male participants will not be adversely affected by the remedy, and no male, affected or not, will lose benefits that were "previously vested." In practical terms, it will be difficult, if not impossible, to attribute a precise effect to the remedy in light of the many uncertainties that shroud the eventual calculation of annuitants' benefits under the TIAA-CREF plan.

Finally, it is not accurate to state, as TIAA-CREF does in its petition, that male participants were not represented at any level of the proceedings below.[11] Thousands of AAUP members are men.[12] Most participate in TIAA-CREF, a fact that was deemed germane by the trial court when it granted the AAUP's motion to intervene in this case.[13] Although the AAUP does not presume to speak for all men who participate in the TIAA-CREF retirement plan, our participation has served to

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[10] Pet. App. 34a-35a (emphasis in the original; record citation omitted).

[11] Pet. 14.

[12] Pet. App. 6a. Approximately 80 percent of the AAUP's 60,000 members are men. *Brief of Intervenor-Appellee American Association of University Professors* 6, submitted in this case in the court below on June 2, 1982.

[13] *See* Pet. App. 121a.

ensure that the views of male participants were articulated and explained in the courts below.

B. *The TIAA-CREF Annuity System.* The petitioners describe themselves as "independent insurers" having no employer-employee relationship with their annuitants,[14] an assertion vital to their legal contention that they are not subject to the nondiscrimination provisions in Title VII of the Civil Rights Act of 1964.[15] In fact, the history of the TIAA-CREF annuity system and the manner in which the system is currently structured suggest a more intimate relationship between the petitioners and their annuitants than the one described in the petition.

TIAA-CREF provides annuity benefits to faculty members at most institutions of higher education in the United States. In all, 3,400 colleges and universities have coordinated the design and administration of their retirement programs with TIAA-CREF, creating what the petitioners have called a "national pension system of [American] higher education." [16]

The TIAA-CREF system was originally conceived and is today operated as a financial service to make careers in higher education more attractive and financially rewarding.[17] TIAA-CREF annuities are available only to faculty members and staff employees at American in-

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[14] Pet. i, 16.

[15] 42 U.S.C. § 2000e *et seq.* (1982), *as amended by* the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (1972).

[16] J.A. 330. In advertisements directed at college and university faculty members, TIAA-CREF characterizes itself as "an integral part of higher education." J.A. 415.

[17] J.A. 172, 226, 251-54, 329. For a description of the history of TIAA-CREF, *see Peters v. Wayne State University*, 476 F. Supp. 1343, 1346 (E.D. Mich. 1979), *rev'd*, 691 F.2d 235 (6th Cir. 1982), *vacated and remanded mem.*, 463 U.S. ——, 103 S.Ct. 3566 (1983), *remanded mem.*, 718 F.2d 1100 (6th Cir. 1983).

stitutions of higher education and qualifying educational organizations. TIAA-CREF annuities cannot be purchased on the open market.[18]

Each plan in the TIAA-CREF system is established by resolution of the educational institution's governing board. Within limits established by TIAA-CREF, the institution determines for itself what provisions on eligibility, participation, contributions, and retirement it wishes to include in its plan. At many institutions (including Long Island University), tenured faculty members are required to participate in the TIAA-CREF plan and must, therefore, depend on TIAA-CREF for investment and payment services.[19] Unlike many pension plans —and, specifically, unlike the deferred compensation plan that was before the Court last year in *Arizona Governing Committee v. Norris*, 463 U.S. ——, 103 S.Ct. 3492 (1983) (per curiam)—the TIAA-CREF plan does not offer participants the option of withdrawing the full amount of their contributions in a lump sum and purchasing an annuity on the open market from another underwriter.[20]

In all these respects, the TIAA-CREF retirement plan differs significantly from the deferred compensation plan in *Arizona Governing Committee v. Norris*. In contrast to the arm's-length relationship between the employer and third-party insurers in *Norris*, the relationship between college employers and TIAA-CREF is extraordinarily close, the product of TIAA-CREF's history and the unique configuration of its national pension system. This unique relationship led the court below to conclude that the activities of TIAA-CREF "are so closely inter-

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[18] J.A. 226, 238, 470, 473.

[19] *See* J.A. 188-193.

[20] Pet. App. 15a n.2.

twined" with college and university employers that they function as one entity for Title VII purposes.[21]

INTRODUCTION AND SUMMARY OF ARGUMENT

Twice in the last six years, this Court has been called upon to decide whether an employer-operated pension plan illegally discriminates against female participants by using sex-segregated mortality tables to set different contribution or benefit levels for employees depending on their gender. In *Los Angeles Department of Water & Power v. Manhart*, 435 U.S. 702 (1978), the Court held that Title VII prohibited an employer from requiring larger pension contributions from female employees than males in order to provide comparable periodic annuity benefits to retirees of both sexes. The Court, however, declined to apply its holding retroactively. Noting that retroactive relief was "not to be awarded automatically in every case," 435 U.S. at 719, the Court identified several equitable reasons why prospective application of its holding was appropriate, including the lack of advance warning that reliance on sex-segregated tables would be declared illegal and the potential impact of the ruling on the financial integrity of the municipal pension plan challenged in *Manhart* and the pension industry in general. *Id.* at 719-23.

Five years later, in *Arizona Governing Committee v. Norris*, 463 U.S. ——, 103 S.Ct. 3492 (1983) (per curiam), the Court reaffirmed its decision in *Manhart* by holding that the use of sex-segregated tables by third-party insurers operating a deferred compensation plan for Arizona state employees violated Title VII. Once again, however, the Court declined to apply its holding retroactively, ruling instead that sex-segregated tables could not be used to calculate benefits based on contributions to be made on or after August 1, 1983. 103 S.Ct.

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[21] Pet. App. 24a.

at 3493. Explaining its remedial ruling, the Court stated that the equitable considerations counseling in favor of prospective relief in *Manhart* were "no different" in *Norris*. Because of the existence of a lump-sum option under the Arizona retirement plan, an option not offered by the employer in *Manhart*, the Court found that the employer in *Norris* "reasonably could have assumed" that the plan was lawful under Title VII. The Court also expressed concern over the "devastating results" for state-supported pension plans that would attend the imposition of retroactive liability. 103 S.Ct. at 3510 (Powell, J., concurring in part).

On the same day that *Norris* was decided, the Court vacated the prior judgment of the Second Circuit Court of Appeals in this case and remanded the case to that court "for further consideration in light of [*Norris*]...." 103 S.Ct. 3565 (1983). The issue now before the Court is whether the subsequent decision of the Second Circuit in this case comports with *Norris*. With respect to liability issues under Title VII, the answer is plainly yes. This Court held in *Norris* that the practice of paying different employment-related benefits to male and female retirees solely on account of sex violates Title VII and is not excused by either the McCarran-Ferguson Act or the delegation of operating authority to third-party insurers selected by the employer. The decision of the court below is fully consistent with *Norris* on these counts, and does not raise a substantial or novel question of federal law warranting review in this Court.[22]

The petition also challenges the appropriateness of the remedy fashioned by the court below. That remedy requires TIAA-CREF to use sex-neutral mortality tables in

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[22] We will make no further mention of the petitioners' assertion that the McCarran-Ferguson Act, 15 U.S.C. §§ 1101 *et seq.* (1982), insulates insurance companies from potential liability under Title VII. The Court's decision in *Norris* "lay[s] the matter to rest." 103 S.Ct. at 3500 n.17 (Marshall, J., concurring in part).

calculating periodic annuity benefits for all similarly situated participants, male and female, who retire on or after May 1, 1980. The remedy, therefore, affects benefits based on contributions made prior to the date of the trial court decision. While *Norris* does not proscribe such a remedy in every case, it does suggest that courts should be sensitive to certain equitable factors in determining whether to invoke the usual Title VII presumption in favor of retroactive relief. The court below correctly identified and applied the *Norris* factors, and correctly concluded that the same factors militating against retroactive relief in *Norris* apply differently here and do not command the same result. The petitioners' argument to the contrary, we assert, is neither sound enough nor substantial enough to merit plenary consideration in this Court.

ARGUMENT

I. The Remedy Fashioned by the Court Below is Consistent with the Equitable Remedial Principles Elucidated in *Arizona Governing Committee v. Norris.*

We address first the argument upon which TIAA-CREF principally relies in its petition: that the remedy fashioned by the court below does not comport with *Norris.*

Norris reaffirms and relies upon the remedial holdings in prior decision of this Court. In *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975), the Court delimited the remedial discretion of trial courts in Title VII cases. Quoting from the legislative history of Title VII, the Court observed that the statute was "intended to give the courts wide discretion [in] exercising their equitable powers to fashion the most complete relief possible." 422 U.S. at 421 (quoting 118 CONG. REC. 7168 (1972) (remarks of Senator Williams)). Courts not only can order "the elimination of the particular unlawful employment practice complained of," but under appropriate circumstances can fashion make-whole remedies designed to

restore plaintiffs "to a position where they would have been were it not for the unlawful discrimination." *Id.*

As the Court later observed in *Manhart*, *Albemarle* creates a presumption in favor of retroactive relief in Title VII cases, a presumption that "can seldom be overcome." 435 U.S. at 719. The repeated references to *Albemarle* in *Manhart* and *Norris* demonstrate that the Court did not intend to foreclose the possibility of retroactive relief in subsequent pension cases. *Manhart* held that a trial court must demonstrate "equitable sensitivity to the impact of a [retroactive] order" (435 U.S. at 720 n.36)—something altogether different from the petitioners' assertion that retroactive relief is never appropriate in Title VII pension cases.[23]

The Court in *Norris* identified three equitable factors for determining the appropriateness of retroactive relief in particular cases. The first, and arguably the most important, is whether a retroactive remedy is necessary to further "the central statutory purposes" of eradicating employment discrimination and making the plaintiff whole for injuries caused by unlawful employment practices. *Albemarle*, *supra*, 422 U.S. at 421. *See Norris*, *supra*, 103 S.Ct. at 3512 n.3 (O'Connor, J., concurring). The second is whether prior rulings "clearly foreshadowed" the decision, thus allowing the court to draw a reasonable inference that the defendant should have known that the conduct complained of would give rise to statutory liability. *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106 (1971); *Norris*, *supra*, 103 S.Ct. at 3512 (O'Connor, J., concurring). Finally, courts ask whether the imposition of retroactive liability will produce "substantial inequitable results" for parties affected by the order. *Cipriano v. City of Houma, Louisiana*, 395 U.S. 701, 706 (1969) (per curiam); *Norris*, *supra*, 103 S.Ct. at 3512 (O'Connor, J., concurring).

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[23] Pet. 10 ("*Norris* squarely rejects retroactivity").

The Court applied these factors in *Norris* and found that, due to circumstances and characteristics special to the Arizona plan, the second and third factors counseled against retroactive relief.[24] The Court held that because of the existence of a lump-sum option under the Arizona plan (an option not available to employees in *Manhart*), the State of Arizona "reasonably could have assumed" that its plan complied with Title VII by fitting within the "open market" exception that *Manhart* specifically embraced. 103 S.Ct. at 3510 (Powell, J., concurring in part). The Court also noted that the Arizona plan (like the municipal plan in *Manhart*) was publicly funded, and expressed fear that retroactive relief would impose "unanticipated financial burdens . . . [on] States and local governments," and through them "on the public." *Id.*

The issue for the court below on remand was whether these equitable factors commanded the same result in this case. The court determined that they did not because the TIAA-CREF plan differed in critical respects from the plan offered to Arizona employees in *Norris*.

In the first place, the decision of the court below was very clearly foreshadowed by *Manhart* and did not come as a surprise to the petitioners. TIAA-CREF participants are not given the option enjoyed by Arizona employees of receiving their retirement savings in the form of a lump sum. While Arizona may reasonably have believed that the lump-sum option distinguished its plan from the Los Angeles plan declared illegal in *Manhart*, TIAA-CREF was indisputably on notice that its plan was illegal under *Manhart*. When TIAA-CREF tried to persuade the court below that the decision in this case

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[24] With respect to the first factor—whether retroactive relief would further the central statutory purposes underlying Title VII—the Court reached no conclusion. Only Justice O'Connor addressed this factor. Her view was that retroactive relief was not required to ensure that pension plan operators abandoned the use of sex-based mortality tables. 103 S.Ct. at 3512 (O'Connor, J., concurring).

was not clearly foreshadowed by *Manhart*, the court disagreed:

> . . . *Manhart* was decided by the Supreme Court over four years ago. Since the decision of that case a number of federal district courts and courts of appeals have declared plans like those at issue here to be unlawful in light of *Manhart*. The record further indicates that in 1974, as a result of the Secretary of Labor's public request for comments on proposed sex discrimination guidelines, TIAA-CREF wrote to its member institutions in order to encourage them to oppose regulations requiring the use of gender-neutral mortality tables. . . . [TIAA-CREF has] had ample opportunity to "voluntarily" revise their mortality tables. The possibility of an order such as that entered by the district court, and by this court today, was foreseeable at least since 1974.[25]

More important, the record in this case shows that the remedy ordered by the court below would impose no significant costs on TIAA-CREF. The potentially devastating financial repercussions feared by the Court in *Norris* are absent here. The remedy fashioned below is different and far less sweeping than the remedies adopted by the lower courts in *Manhart* and *Norris*. In those cases, employers were required to adjust contributions or benefits for women to bring them in line with the more favorable levels enjoyed by men; the result in each case was to impose new obligations on fund reserves, obligations so burdensome that they arguably threatened the solvency of the pension systems. Here, by contrast, the court below took advantage of the unique characteristics of the TIAA-CREF system to fashion a remedy that compels equalization of future benefits without changing the total anticipated obligations on reserves.[26] The court observed:

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[25] Pet. App. 32a-33a (citations omitted).

[26] As the trial court observed, the relief ordered in this case "will merely vary the future allocation and distribution of an unaffected amount of assets. For this reason, the Court believes that

> [T]he "retroactive" relief awarded here is not nearly so drastic as that sought by plaintiffs and awarded by the district court in *Manhart*. There the district court's order . . . required Plan administrators to remove money from the fund for this purpose. The fund would nevertheless have been required, at the same time, to meet undiminished obligations. In the present case *a "retroactive" award does not require the wholesale removal of moneys from TIAA-CREF reserves.* The equalization of the amount of monthly payments to be received by similarly-situated male and female employees can be calculated so as not to change the total anticipated obligations of the funds.[27]

These factual findings, we believe, are well-supported by the record and not affected by anything this Court said or did in *Norris*.

Finally, the court below concluded that retroactive relief was the only remedy that could achieve the statutory goal of eradicating discrimination. The court, quoting *Albemarle*, held that any other form of relief "would fly in the face of the primary purpose of Title VII—to 'make persons whole for injuries suffered on account of unlawful employment discrimination.'" [28] It would be anomalous, the court observed, to invalidate the use of sex-based tables while at the same time "postpon[ing] full conversion to gender-neutral tables for as much as 30 to 40 years." [29] That was true before *Norris* and it is still true today.

In sum, the court below properly applied the equitable factors identified in *Norris* to the TIAA-CREF retirement plan and determined that, under the facts presented here, a retroactive remedy was feasible and appropriate.

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the remedy it has fashioned does not involve impermissible retroactive relief within the meaning of *Manhart*." Pet. App. 89a.

[27] Pet. App. 33a-34a (emphasis added).

[28] Pet. App. 37a.

[29] Pet. App. 34a.

That conclusion, premised on the unique financial and organizational characteristics of TIAA-CREF, neither departed from nor enlarged upon the analytic approach utilized by this Court in *Albemarle*, *Manhart*, and *Norris* for gauging the propriety of retroactive relief under Title VII.

The petitioners argue that the remedy fashioned below is unfair to the class of male participants who, by virtue of their higher aggregate mortality rate, will end up subsidizing to some extent the benefits paid to the class of female participants.[30] This argument was specifically addressed and rejected in *Manhart*, where the Court observed that the subsidization of one beneficiary class by another "is a common practice that has never been considered inherently unfair." 435 U.S. at 710. To the suggestion that a gender-neutral pension plan would discriminate against male employees, the Court responded that "[e]ven a completely neutral practice will inevitably have *some* disproportionate impact on one group or another. [Our decisions do] not imply, and this Court has never held, that discrimination must always be inferred from such consequences." *Id.* at 710-11 n.20 (emphasis in the original).

On a more fundamental plane, TIAA-CREF's reliance on aggregate benefits for classes of male and female retirees perpetuates the very sex stereotyping the Court condemned six years ago in *Manhart* and again last year in *Norris*. The only way TIAA-CREF can determine the size of the cross-subsidy paid by the *class* of male retirees to the *class* of females is by categorizing employees on the basis of their sex and then making generalizations about the expected longevity of class members. *Norris* holds that it is illegal to impute a sexually linked class characteristic—even a true one—to individual class members as to whom the generalization may not apply:

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[30] Pet. 14-16.

"Title VII requires employers to treat their employees as *individuals*, not 'as simply components of a racial, religious, sexual, or national class.'" 103 S.Ct. at 3498 (Marshall, J., concurring in part) (emphasis in the original), quoting *Manhart*, *supra*, 435 U.S. at 708. TIAA-CREF's insistence on dividing participants for analytic purposes into two separate classes, male and female, cannot be reconciled with the conclusion in *Manhart* and *Norris* that employees must be treated as a single, sexually integrated group.

TIAA-CREF also argues that, unless the petition for certiorari is granted, additional litigation will be generated by the Second Circuit decision. TIAA-CREF cites thirteen cases currently pending in the lower federal courts, and suggests that more litigation will ensue unless the Court grants certiorari and adopts a rule barring retroactive relief in all pension cases.[31]

As the petition acknowledges, eight of the thirteen pending cases involve pension plans operated by TIAA-CREF. If the petition for certiorari is denied, the changes TIAA-CREF will then be required to make in the calculation and payment of retirement benefits will resolve those eight cases immediately. The remaining five cases do not constitute, in our judgment, an unreasonable or unmanageable burden for the lower federal courts. Nor is that burden likely to increase significantly in the future, since defined contribution plans such as TIAA-CREF's—the only plans, in practical terms, that make distinctions between male and female participants based on sex-linked mortality differences—cover only a small proportion of American pension plan participants.[32]

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[31] Pet. 12 n.4 and accompanying text.

[32] The United States Department of Labor estimates that 30.5 million American workers are active pension plan participants. Only ten percent of those workers rely on defined contribution plans as their primary source of retirement income. The vast majority—

Norris indicates clearly that courts, in fashioning remedies in Title VII pension cases, should be sensitive to certain equitable considerations. *Norris* leaves to the lower federal courts the task of determining the equities in particular cases—a task to which the lower courts are well suited. When equitable considerations govern, there is no reasonable alternative to the kind of fact-specific, case-by-case adjudication represented by the decision of the court below in this case; certainly the invitation to fashion inflexible rules is not in the spirit of equitable jurisprudence. "The essence of equity jurisdiction has been the power of the Chancellor . . . to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it." *Hecht Company* v. *Bowles*, 321 U.S. 321, 329 (1944).

The remedy ordered by the court below, in sum, is not unfair to male participants individually or collectively. The Court considered and rejected the same claim of inequity when it was asserted on behalf of male employees six years ago in *Manhart*. The petitioners have not shown that the decision of the court below was incorrect or in conflict with the decisions of other courts of appeals or this Court. There is no reason, accordingly, for the Court to grant review on the issue of remedy.

II. The Decision of the Court Below on Liability Issues is Not in Conflict with the Decision of Any Other Federal Appellate Court.

We next address TIAA-CREF's contention that it is not subject to the antidiscrimination provisions in Title VII because it does not "employ" the complaining female participant.

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ninety percent of all pension plan participants—receive their sole or primary pension benefits from defined benefit plans, most of which calculate periodic retirement benefits on a sex-neutral basis. U.S. DEP'T OF LABOR, COST STUDY OF THE IMPACT OF AN EQUAL BENEFITS RULE ON PENSION BENEFITS 8-9 (1983).

Contrary to the assertion in the petition,[33] there is no conflict between the circuits on this question. The Sixth Circuit decision in *Peters v. Wayne State University*, 691 F.2d 235 (1982), invoked by the petitioners as the source of the conflict, was subsequently vacated by this Court, and the case is now pending in the United States District Court for the Eastern District of Michigan.[34] The petitioners cite no other case, and we know of none, that is inconsistent with the ruling of the court below on the question of TIAA-CREF's exposure to liability under Title VII.[35]

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[33] Pet. 16.

[34] 463 U.S. ——, 103 S.Ct. 3566 (1983), *remanded mem.*, 718 F.2d 1100 (6th Cir. 1983).

[35] TIAA-CREF neglects to mention in its petition that after this Court vacated the decision in *Peters*, the Sixth Circuit decided a case that may have changed the law of that circuit on this very question. The issue in *Armbruster v. Quinn*, 711 F.2d 1332 (6th Cir. 1983), was whether salesmen paid commissions in lieu of salaries were "employees" of the defendant company for Title VII purposes. The company had successfully argued in the trial court that the salesmen were "independent contractors," as distinguished from statutory employees. On appeal, the Sixth Circuit reversed. "Since this statute has been universally held to be broadly remedial in its purpose," the court began, "such remedial effect can be given only upon a broad interpretation of the term employee. We are unpersuaded that the term 'employee' was meant in a technical sense, divorced from the broadly humanitarian goals of the Act." 711 F.2d at 1340-41. The court then fashioned a new test for determining whether particular complainants merit Title VII's protection:

> [O]ne must examine the *economic realities* underlying the relationship between the individual and the so-called principal in an effort to determine whether that individual is likely to be susceptible to the discriminatory practices which the act was designed to eliminate . . . . [Title VII covers] all those who are in a position to suffer the harm the statute is designed to prevent, unless specifically excluded. Were there a doubt or

The lower federal courts have uniformly held that Title VII extends beyond the conventional employer-employee relationship. The statute reaches "agents" of an employer, employment agencies, and labor organizations, none of which "employs" potential Title VII complainants in the ordinary sense of that term.[36] Rather than prohibiting discrimination against "employees," the statute prohibits discrimination against "any *individual*" on account of "such *individual's*" race or sex[37]—"a strong indication," in the words of one appellate court, "that the proscriptions contemplated by Section 703(a)-(1) reach beyond the immediate employment relationship."[38]

The consistent approach of the lower federal courts on this question and the absence of any conflict between the circuits regarding the potential liability of TIAA-CREF under Title VII suggest that there is no reason for the Court to grant review on this issue.

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ambiguity in the matter, we would resolve it in favor of coverage.

Id. at 1340, 1341 (emphasis added).

In sum: Not only was *Peters*, the single case cited by TIAA-CREF as the source of a conflict between the circuits, subsequently vacated; but there is every reason to believe that, when *Peters* again reaches the Sixth Circuit, the "economic realities" test subsequently adopted in that circuit will impel a result contrary to the one reached in *Peters* the first time around.

[36] Civil Rights Act of 1964 §§ 701(b), 703(b), (c), 42 U.S.C. §§ 2000e(b), 2000e-2(b), (c) (1982). *See Sibley Mem. Hospital v. Wilson*, 488 F.2d 1338, 1341 (D.C. Cir. 1973).

[37] Civil Rights Act of 1964 § 703(a)(1), 42 U.S.C. § 2000e-2(a)-(1) (1982) (emphasis added).

[38] *Sibley Mem. Hospital, supra*, 488 F.2d at 1341. *Accord, Armbruster v. Quinn*, 711 F.2d 1332, 1336 (6th Cir. 1983). *See Baker v. Stuart Broadcasting Co.*, 560 F.2d 389, 391 (8th Cir. 1977); *Vanguard Justice Society, Inc. v. Hughes*, 471 F. Supp. 670, 696 (D. Md. 1979); *Puntolillo v. New Hampshire Racing Comm'n*, 375 F. Supp. 1089, 1091-92 (D.N.H. 1974).

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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No. 84-50

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

TEACHERS INSURANCE AND ANNUITY ASSOCIATION AND COLLEGE RETIREMENT EQUITIES FUND,
Petitioners,

v.

DIANA L. SPIRT, *et al.*,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

OBJECTIONS BY RESPONDENT DIANA L. SPIRT TO PETITION FOR WRIT OF CERTIORARI

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OBJECTIONS BY RESPONDENT DIANA L. SPIRT TO PETITION FOR WRIT OF CERTIORARI

AS TO QUESTIONS PRESENTED

None of the questions stated by petitioners Teachers Insurance and Annuity Association and College Retirement Equities Fund ("TIAA-CREF") in their petition for writ of certiorari reflect any errors of law or are of sufficient importance or worthy of review by this Court, and their petition should be denied.

The judgment of the Court of Appeals for the Second Circuit does not conflict with any judgment of any other

Court of Appeals (Ques. 1) and its decision after remand by this Court for consideration in light of *Norris*[1] (103 S.Ct. 3565) shows not only "sufficient attention" to the equitable nature of the matter of retroactivity but also reflects a full consideration of its prior decision under that mandate and the applicable equitable considerations. In so doing, the Court of Appeals examined every facet of the issue and underscored its factual determination on the equitable consequences from the retroactivity and *reasons* retroactivity met all the requirements of *Norris*.

Questions 2 and 3 are repeated by petitioners TIAA-CREF from their prior petition in this action, and the mandate did not require that they again be given consideration.

Furthermore, the ruling of the Court of Appeals on the McCarran-Ferguson Act, 15 U.S.C. §§ 1011 *et seq.* (1982) ("McCarran Act") is misstated in No. 3. Any state law which would bar the application of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-1 *et seq.* ("Title VII") was preempted but, in any event, no state law has been invalidated, impaired, or superceded, and the McCarran Act was not held to deal only with the application of federal antitrust laws.[2]

SUMMARY OF ARGUMENT

TIAA since 1918 and CREF since 1952 have been part and parcel of the higher educational system in the United

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[1] *Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans* v. *Norris*, 103 S.Ct. 3492 (1983) ("*Norris*").

[2] The Court of Appeals noted that historically the McCarran Act arose because of and was primarily intended to deal with the federal antitrust laws. It served the additional role of ensuring states of their traditional role in relation to insurance regulation (28a). The court in no way made the suggestion imputed to it.

States and for those decades their pension plans have been the pension plans and part of the terms and conditions of employment of the professors and certain other employees of institutions of higher education.

Now, about 3,000 institutions and several hundred thousand faculty and other employees have the pension plans as an integral part of their employment arrangement (13a).[3] In the case of respondents Long Island University ("LIU") and Spirt, participation in the plans has been mandatory (36a, 57a), and the plans are admitted to be a fringe benefit (JA216), to relate to Spirt's terms and conditions of employment (JA216) and, as such, to be subject to the collective bargaining agreement and to negotiations between the duly certified bargaining representative and LIU (JA216).

On April 15, 1974, the plans had been under challenge in this action for ten years, and TIAA-CREF finally have had to forego their discrimination against female participants which resulted from the use of sexually segregated annuity tables ("unisex tables").

On July 6, 1983, this Court delivered its opinion in *Norris*. At the same time, the Court granted the Petition for Certiorari filed in this action by TIAA-CREF,[4] from the September 29, 1982 judgment of the Court of Appeals, Second Circuit, and remanded it "for further consideration in light of" *Norris*. 103 S.Ct. 3565, 3566 (1983).

Immediately upon remand and in July, 1983, respondent Spirt filed a motion in the Court of Appeals for

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[3] Citations to material in the Appendix filed by petitioners appear as "____a" and material in the Joint Appendix filed below appear as "JA ____."

[4] Spirt did not object to that petition and joined in the request for expedition.

reinstatement of the prior opinion on the ground that the consideration ordered by this Court led to only one conclusion which was that the prior opinion of September 29, 1983 was in each and every respect fully in accord with *Norris* and in particular was in compliance with the duty to give sufficient attention to the equitable nature of retroactive relief and with the reasons and authority *Norris* stated for exercising equitable discretion as to retroactivity.

The record on consideration of the equitable factors is loud and clear. There is no impact on the funds, petitioners TIAA-CREF or respondent LIU, and the equitable considerations were taken into account as to *all* litigants and participants in the plans.

TIAA-CREF acknowledged that the liability issue was finally laid to rest by *Norris* (3a) and that their prospective use of segregated tables was barred. They urged, however, that the operative portions of the Opinion of September 29, 1982 could be reinstated only as to contributions paid into the plans prior to August 1, 1983, since, in the words of TIAA-CREF, *Norris* "barred" retroactivity. Thus, they urge that all funds they have received prior to that date are still subject to the discriminatory treatment. There is now conceded discrimination and liability (3a) but relief is said to be unavailable.

Thus, on remand the issue of retroactivity was again presented.

Careful consideration was given by the Court of Appeals, and the prior opinion was determined to comply with *Norris*, being modified only for the minor and irrelevent matter.

The action of respondent Long Island University ("LIU") and the Superintendent of Insurance for the State of New York ["Superintendent (NY)"] in the proceeding on remand is important.

The Court of Appeals stated in its first opinion that the Superintendent (NY) was "precluded from disapproving plans designed to conform with the order" and noted that the Superintendent (NY) indicated that he would comply with the final order of the Court (26a).[5] He filed no petition before this Court, took no step to challenge his preclusion and, shortly after the remand acting either within the scope of the statutory provisions of the State of New York or in full agreement that such laws have been preempted, has formally approved the elimination of the use of segregated tables from plans of TIAA-CREF and approved the prospective use of unisex tables.[6]

On remand in an *amicus curiae* brief (although a party to the proceeding and issues), the Superintendent (NY) represented that the future use of unisex tables did not in any way interfere with his regulation of the industry and that he could function in a manner which is consistent with and protective of plaintiff's rights under Title VII and other employee's contractual rights. Thus, while ignoring the holding of preemption by Title VII, the Superintendent (NY) clearly concedes that Title VII does not interfere with New York's regulation of insurance by anything in this action.

Respondent LIU, the common law employer of respondent Spirt, has not sought review of the second decision which TIAA-CREF petition to have reviewed. LIU took the position on remand that retroactivity was not ordered by the Supreme Court and the issue for the Court of

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[5] A Deputy Superintendent (NY) has recognized that federal jurisdiction applies to pensions in areas of discrimination and "they are beyond the reach" of the state regulators. Lamel, *State Regulation of Insurance Industry*, Ins. L. J. 336, 348 (1978).

[6] On prior occasions he approved unisex tables in proposals considered in connection with activities related to this action. (18a, 30a).

Appeals to decide was whether the relief it ordered was "appropriate in light of *Norris*." It contended that "*Norris* [had] also determined that all parties involved in the delivery of pension or deferred compensation benefits are governed by Title VII. Thus [it argued] Title VII applies to TIAA-CREF." (LIU's Brief on Remand, p. 3)

TIAA-CREF are now embarked on a procedure that could leave LIU alone, exposed to the full impact of the final judgment and injunction herein while they run to the side lines, taking their money with them, and continue segregated payments for all retirees after August 1, 1983 with respect to any contribution prior to that date. LIU could be compelled by the final judgment to pay the difference to females, and any success of TIAA-CREF on the escape points they seek to have reviewed would not alter LIU's responsibility.

After over 60 years for TIAA and 30 years for CREF, in service to colleges and universities and their employees and acting in relation to employees' benefit plans and their compensation, the two petitioners are turning from the institutions and participants and the only treatment of all employee-participants which the Court of Appeals has found under *Norris* was fair and equitable to all employee-participants and would not cost the fund one cent.

REASONS FOR DENYING THE WRIT

I. *NORRIS* DID NOT "SQUARELY REJECT RETROACTIVITY"

Petitioners claim that "*Norris* squarely rejects retroactivity." (Pet. 10)

Thus, petitioners conclude that Title VII has in effect been amended and that certain rulings in the decisions in *Albemarle Paper Co.* v. *Moody*, 442 U.S. 405 (1975) and

City of Los Angeles Dep't of Water & Power v. *Manhart*, 435 U.S. 702 (1978) were overturned by *Norris*.

Albermarle declared the strong presumption in favor of retroactivity of relief in Title VII actions (the "*Albemarle* Presumption"). *Manhart* recognized those statements, stated that such *Albemarle* Presumption could "seldom be overcome" (435 U.S. at 719), and acted in ordering prospective relief "without qualifying the force of the *Albemarle* Presumption in favor of retroactive relief" (435 U.S. at 724). However, the facts in *Manhart* showed that a substantial financial harm would result to the plan and its funds from the retroactive relief ordered by the lower court. The funds of the plan would be placed in jeopardy, or the plan could be bankrupt by paying the relief ordered.[7] The opinions of Justice Powell and Justice O'Connor agree that these dire consequences were the persuasive point in *Manhart* and concluded that the dire consequences flowing from the required payment accounted for the result and, consequently, led to the *Norris* conclusion.

Taking into account that the lower court in *Spirt* not only does not require "topping up" but equalizes the benefits of males and females at an actuarial new point between segregated benefits, the conclusion is inescapable that in terms of dollars to the plans the results of the *Manhart-Norris-Spirt* judgments are the same—no dollar cost to the particular defendants or plans.

Not one of the nine Justices in *Norris* interpreted *Manhart* as petitioners have; rather *Norris* and its application

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[7] Note should be made that in *Norris* Justice O'Connor points out that *Manhart* did not condemn all retroactive payments (refunds) in that case to women, and retroactive payments could be considered on remand, citing *Manhart*, 435 U.S. at 720, n.36. 103 S.Ct. at 3512, n.4.

of *Manhart* teach that retroactivity is not "squarely rejected." In light of the findings of fact on the equities involved, the relief should be left in place and the petition denied.

Norris Opinions

Respondent submits that there is a consensus that can be found in *Norris* in the reasoning of the separate opinions that retroactivity is proper here.

Justice Powell's Opinion

In writing for the majority on the point, Justice Powell indicated that although *Manhart* recognized that *retroactivity of* relief is normal in Title VII cases (*Albemarle* Presumption), the granting of retroactive relief on the *Norris* facts would be an abuse of discretion, since such facts revealed that the cost of retroactivity would have "devastating results." That result flowed not only from the "topping up" required by the lower court but also from such "topping up" to the artifically higher, segregated male level derived from use of the outlawed mortality tables.

Justice Powell agreed with Justice Marshall (writing for the dissent, *infra*) that the relief awarded in *Norris* was retroactive in requiring that contributions for women be "topped up" upon retirement in order that equal benefits would result at the male level calculated under the male segregated tables. Justice Powell points out (103 S.Ct. at 3510, fn. 10) that:

> "In order to provide women with the higher level or periodic payments ordered by the District Court, the State of Arizona [employer] would be required to fund retroactively the deficiency in past contributions made by its women retirees."

He mentions in fn. 11 *(id.)* the three factors bearing on the added cost of equalizing benefits to females to the higher level paid males:

> "The cost to employers of equalizing benefits varies according to three factors: (i) whether the plan is a defined contribution or a defined benefit plan; (ii) whether benefits are to be equalized retroactively or prospectively; and (iii) whether the insurer may reallocate resources between men and women by applying unisex rates to existing reserves or must top up women's benefits. The figures in text assume, as the District Court appeared to hold, see 486 F. Supp. 645, 652, that employers would be required to top up women's benefits."

In Spirt, the third factor, reallocation of resources by using unisex tables with existing reserves, was the method used. The first and second factors play no role in this case in considering impact;[*] consequently, there is no cost to defendants, TIAA-CREF or LIU. Furthermore, no "topping up" is required by TIAA-CREF or LIU and unisexing is simply applied to reallocate the existing funds.

TIAA-CREF very neatly distort Justice Powell's words and reasoning by quoting (Pet. p. 7) the phrase "both unprecedented and manifestly unjust", and by omitting his reference and limitation of his statement to the *Norris* "award", they improperly suggest that the phrase applies to all retroactivity. They ignore his analysis of the record and the threats of insolvency to the plan and jeopardy to the benefits which would cause manifest unjustice. Any such facts are foreign to the present record and do not exist.

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[*] TIAA-CREF plans are defined contribution plans (benefits based on amount actually received for each participant) as opposed to a defined benefits program, and no current retirees for equalization, retroactive or prospective, are involved in *Spirt;* it is limited to deferred annuitants.

Justice O'Connor's Opinion

Justice O'Connor concurred with Justice Powell's conclusion on relief. She relied on the *Manhart* Principle as being dispositive of the *Norris* case both on the issue of liability and the issue of relief. As to the relief and *Manhart*, she wrote:

> "Ultimately, I find this case controlled by the same principles of Title VII articulated by the Court in *Manhart*." (103 S.Ct. at 3512)

In dealing with *Manhart* and retroactivity, she cited the three criteria set forth in *Chevron Oil Co.* v. *Huron*, 404 U.S. 97, 105-107 (1971) for determining when to limit the retroactive application of a decision on statutory interpretation, although ultimately, she rested on *Manhart*. The three criteria are:

> *First criteria*—either a new principle of law is declared by overruling clear past precedent or by deciding an issue of first impression not clearly foreshadowed.[9]
>
> *Second criteria*—whether the operation of the statute be furthered or retarded by retroactive application.[10]
>
> *Third criteria*—will "inequitable results" be imposed by retroactive application. (103 S.Ct. at 3512)

Contrary to the assertion of TIAA-CREF (Pet., p. 14, fn. 6), the first and second criteria were actually non-points and present no barrier here; the third point of

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[9] The outcome of this action was foreshadowed by activities as early as 1973, by the filing of this action in 1974, and by the stream of activities thereafter. *See*, First (31a-36a) and Second (9a) Opinions of the Court of Appeals.

[10] The denial of retroactivity under the circumstances "would fly in the face of Title VII" (37a); Title VII would be substantially retarded.

unequitable results was persuasive to Justice O'Connor since the entire *Norris* plan could be jeopardized by requiring the additional "topping up" payment from the employer, reserves would be endangered and bankruptcy could ensue. In brilliant contrast to the *Norris* facts, the following references by Justice O'Connor (103 S.Ct. at 3512) concerning the third criteria are satisfied by *Spirt:*

> (1) "[T]he existence of adequate reserves to fund these pensions" lacking in *Norris* continue unaltered in *Spirt.*
>
> (2) No requirement is imposed that TIAA-CREF "must disburse greater annuity benefits than the collected contributions can support [which] would jeopardize the entire pension fund." TIAA-CREF's cash flow is unaltered.
>
> (3) "The fund [of TIAA-CREF] can . . . meet its obligations."
>
> (4) There is no "real danger of bankrupting the pension" fund.

Justice Marshall's Dissenting Opinion On Relief

Justice Marshall, writing for the dissent on relief, set out the broadest rules for retroactivity and concluded that the facts and the rulings in *Manhart* and *Albemarle Paper* controlled to make past contributions subject to relief. He would, however, have required a further review by the lower court on points not present here.

In emphasizing the *Manhart* principle and the *Albemarle* Presumption, the teaching of *Norris* leaves the answer on retroactivity to be found in the *Spirt* record and to be based on the exercise of discretion with sufficient attention being given to equitable considerations of that record. The Court of Appeals on remand, after again examining all aspects of the impact, concluded:

> "After a careful consideration of the majority opinion in *Norris* on the issue of relief, we conclude that the Court did not intend to bar retroactivity in the circumstances of this case" (7a).

Now, TIAA-CREF seek to march backward and attempt to have points reviewed which were long disposed of. And, they again pick up the cudgel for the males, suggest males are simply innocent, third-party bystanders, and proceed to ask protection of the use of segregated, discriminatory sex tables for males and *against* females for Pre-August, 1983 contributions. TIAA-CREF are thus artifically dividing the pensions of employees who have contributed before and after August, 1983 partly into discriminatory benefits and partly into complying equitable benefits. TIAA-CREF are also repeating the old canard that females are attempting without precedent and with manifest unjustice to take vested money from the males, which, according to TIAA-CREF is "an invasion of men's benefits contrary to contractual commitment" (Pet., p. 14).[11] The *individual* females who have been victimized in the past are unfairly and inaccurately made out to be the plunderers; whereas, under the use of segregated tables individual males are subsidized by and receive funds legally belonging to the individual females. TIAA-CREF, presumably disinterested trustees, refuse to accept the fact that they are required to give equitable consideration to *all* participants.

The point as to males presented in the Petition condenses arguments dating back to 1974 in this action which have been answered by every decision in this action since then. It is a reargument that "actuarial equality" and the

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[11] Any "invasion" is directed at illegal benefits and three lower court decisions rule there was no commitment or understanding and none is cited.

use of sex and age were a commitment forever locked in for males before August, 1983. TIAA-CREF argue that the unfair and inequitable conditions for females must remain in place as a windfall for males who would continue being subsidized in future retirements from females' pre-August, 1983 contributions for 40 or so more years.

The Court of Appeals after its review in light of *Norris* left its "assessment of the equity . . . unaltered" (9a) and affirmed its prior conclusions that there was no commitment to males and no understanding or reliance by them (31a-36a). Rather, as early as 1972 and 1973 reliance was "unjustified in light of the visibility [to males] of the issue of legality of using such [segregated] tables" and the conclusion as to windfall and subsidy was also clear from those years.

In September, 1972 TIAA-CREF advised all participants:

> "How much if any, all this ['unlawful practice . . . which differentiates in benefits on the basis of sex'] will be deemed unlawful employment practice [under Title VII] is for the EEOC and Courts to decide." (JA111)

Then the July, 1973 periodical to participants issued by TIAA-CREF referred to complaints already filed by females against institutions which charged discrimination by reason of the plans and challenged the system (JA477). The periodical concluded that matters were yet to be resolved, "probably in the Courts" (JA483). In 1974, in response to the Secretary of Labor's request for comments on sex discrimination guidelines, TIAA-CREF wrote encouraging opposition (33a). That same year this action was filed.

The Court of Appeals reviewed these and other facts and found that the possibility of a declaration of illegality and injunction "was foreseeable at least since 1974" (33a).

A further point to consider is that females since the early 1970s have held expectations that the discrimination was illegal and would be eliminated. The road was long but hope persisted that equity would prevail and the individual female would be treated no differently from the individual male.

Notice to all participants—male and female—existed that the expectations were being pressed in every forum and that the plans were exposed to a finding that illegal payments were involved.

No commitment to males for continuation of the illegal results can be implied. The discussions by the Court of Appeals in its Opinions are the best answer to such suggestions (8a-9a and 31a-37a).[12] Finally, in comparing *reasonable* expectations, this Court may contrast, on the one hand, the written notices all participants, *including males*, received from TIAA-CREF in 1972 and 1973 that the plan had been challenged by females as discriminatory by the filing of charges with the EEOC which was followed by the complaint herein then others with, on the other hand, the fact and rulings of illegality and the expectation of females that a "unisex" system was required and at some point in time would be in place.

II. TIAA-CREF ARE NOT GRANTED IMMUNITY FROM TITLE VII BY THE McCARRAN-FERGUSON ACT

The McCarran Act has not become the equivalent of a constitutional clause. *Cooper* v. *General Dynamics*, 533 F.2d 163, 169, *reh. en banc den.*, 537 F.2d 1143 (5th Cir. 1976), *cert. den. sub. nom., International Association of*

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[12] The District Court was more explicit; it concluded that the relief ordered would "avoid any question of the impairment of the contract rights of male participants," (87a) and considered the contract point further on reargument (90a).

Machinists, etc. v. *Hopkins*, 433 U.S. 408 (1977). More recently in *Group Life & Health Insurance Co.* v. *Royal Drug Co.*, 440 U.S. 205, 225-27 (1979) *("Royal Drug")*, this Court indicated "business of insurance" was to be narrowly construed because "Congress did not intend the business of insurance to be *broader* than it commonly understood meaning [and] the *contemporaneous* perceptions were highly significant in ascertaining congressional *intent*." (emphasis added)

The Court of Appeals considered the impact of the McCarran Act (25a). So, apparently, has the Superintendent (NY) who finds his activities unimpeded by *Spirt*.

The fact is that after a careful analysis the Court of Appeals in this action concluded:

> "We hold, therefore, that Title VII explicitly preempts New York Insurance laws to the extent that they 'require or permit' a method of calculating pension benefits that we have found to be 'an unlawful employment practice' under Title VII. Therefore, the McCarran Act does not exempt TIAA[13] from complying with the dictates to Title VII. Having so held, we need not reach the question whether application of Title VII will invalidate, impair, or supersede New York State Insurance law. (30a) (fn. added).
>
> "It is to be noted, however, that although the State Superintendent of Insurance has approved two sets of proposed unisex mortality tables for calculation of benefits based on contributions made after the date the new plans are approved, he has indicated that he will not aprove such tables for use in calculating benefits based on contributions made prior to the

---

[13] CREF was dealt with separately (26a-27a). The Court of Appeals agreed with the District Court and, in particular, relied on *SEC* v. *Variable Annuity Life Ins. Co.*, 359 U.S. 65, 69 (1959).

> effective date of the new plans. Obviously, our holding that Title VII pre-empts state insurance law with which it conflicts dictates that where the relief ordered necessarily has an impact on contributions paid to TIAA and CREF prior to the effective date of our order, the New York State Superintendent of Insurance will be precluded from disapproving plans designed to conform with the order." (30a)

Based on representations to it by the Superintendent (NY), the Court of Appeals went on to say in fn. 10:

> "We note that the Superintendent has indicated that he will, of course, comply with a final order of this Court." (30a)

TIAA-CREF in their Petition in Question 3 represented that the Court of Appeals limited the McCarran Act, "in effect, only to federal antitrust legislation" and in the text represent that McCarran Act was "essentially limited" by that Court to federal antitrust disputes. (18a) Both statements are wrong. While the lower court found the historical fact that the McCarran Act came about in direct reaction to *United States* v. *South-Eastern Underwriters Assoc.*, 322 U.S. 533 (1944), Congress' purpose was expressly found to be much broader. However, even though the lower court held there was preemption it found that there was no Congressional intent to declare subsequently enacted civil rights legislation inapplicable to any or all insurance company activities classified as the business of insurance. Furthermore, the McCarran Act did not render Title VII inapplicable to employment-related pension plans. (28a)

Respondent Spirt presents five other distinct reasons as back-ups to preemption for rejecting the attempt to seek review and to establish the McCarran Act as a basis for immunizing the discriminatory annuities of petitioners from Title VII; in addition, consequences for equita-

ble considerations result from the attempt by TIAA-CREF to walk away from its responsibility to the institutions which they were created to serve and which have implanted the plans into the terms an conditions of employment and use such rules as part of the compensation to their employees. TIAA-CREF would leave such institutions facing the responsibility alone.

The five other points are as follows:

(1) ERISA Causes Title VII To Preempt State Law As To TIAA-CREF

The Employee Retirement Income Securities Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001, *et seq.*, is a basis for preemption. The TIAA-CREF plans are regulated under ERISA and were submitted to and approved by it. The regulation of such plans has been established "as exclusively a federal concern." *Alessi* v. *Raybestos-Manhattan, Inc.*, ___ U.S. ___, 101 S.Ct. 1985, 1906 (1981).

The preemption provisions set forth in § 514(a) of ERISA, 29 U.S.C. § 1144, are broad in superseding "any and all state laws insofar as they now or hereafter relate" to a covered plan. Section 514(a) states that ERISA, except as provided in subsection (b), is not to be construed as exempting any person from any state law which regulated insurance, banking or securities; however, § 514(b)(2)(B) provides:

> "(B) Neither an employee benefit plan [such as the LIU-TIAA-CREF plan] described in section 4(a), which is not exempt under section 4(b) . . . , nor any trust established under such a plan, *shall be deemed to be an insurance company* or other insurer, bank, trust company, or investment company *or to be engaged in the business of insurance* or banking *for the purpose of any law of any State purporting to reg-*

> *ulate insurance companies, insurance contracts,* banks, trust companies, or investment companies." (Emphasis added)

The remarks in the Joint Explanatory Statement of the Committee of Conference reporting on this section explained that employee benefit plans are not to be considered insurance companies or in the business of insurance for purposes of any State laws that regulate such. H. Conf. Rep. No. 93-1280, 93rd Cong., 2d Sess., 1974 *U.S. Code Cong. and Adm. News* 5162. *See Marshall* v. *Chase Manhattan Bank*, 558 F.2d 680, 682 (2nd Cir. 1977).

(2) The McCarran Act By Its Express Terms Does Not Bar Preemption

McCarran Act does not affect the requirements and provisions of the Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.*, ("FLSA") which is pleaded by plaintiffs as a jurisdictional basis for her claim (Amend. Compl. ¶ 1; JA140) and is part of the statutory basis of this action.

Certain specified defenses of the Equal Pay Act amendment, 29 U.S.C. § 206(d), to the FLSA, which are incorporated by the Bennett Amendment into Title VII [§ 703(h), 42 U.S.C. § 2000e-2(h)] have been unsuccessfully urged by TIAA-CREF in this and related actions.[14] *See*, District Court decision in this action, 475 F. Supp. at 1309 (73a-74a). And in their petition, the further question raised by TIAA-CREF as it was in the Court of Appeals (TIAA-CREF Brief, May 11, 1982, p. 41) is whether the Equal Pay Act also makes applicable the "good faith reliance" defense of the Portal-to-Portal Act, 29 U.S.C. § 251, which is also part of the FLSA (Pet., p.

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[14] *E.g., E.E.O.C.* v. *Colby College, et al.*, 589 F.2d 1139 (1st Cir. 1978).

15, n. 8). Thus, TIAA-CREF are urging selected sections of the FLSA, But they cannot winnow out the McCarran Act's express declaration that nothing in the FLSA:

> ". . . shall be construed to affect in any manner the application to the business of insurance of . . . the Fair Labor Standards Act. . . ." 15 U.S.C. § 1014.

TIAA-CREF have conceded in the lower court that the McCarran Act "does not bar the plaintiff's claims under the Fair Labor Standards Act [Equal Pay Act] . . . because the later Act is specifically exempted" from the McCarran Act. [TIAA-CREF Brief, Aug. 19, 1975 (fn., p. 39); DN21].

In view of the foregoing, the combined provisions of Title VII, the FLSA and the McCarran Act are congressional commands which are clear, and the McCarran Act by its terms is no obstacle to Title VII.

(3) In Their Pension Annuity Business Neither TIAA Nor CREF Can Claim That Title VII Does Not Apply. Superintendent (NY) Makes No Such Claim.

TIAA and CREF were created solely as an adjunct of and for service to the institutions such as defendant LIU and the 3,100 or so others with which they are so closely intertwined. The details of the interplay between the institution and TIAA-CREF are set forth in present record in reflecting the position of TIAA-CREF as the *alter ego* of LIU (and the others) in the area of retirement planning and pension benefits (JA172, Stip. of Facts, Nos. 3-9). TIA-CREF were organized to serve and fulfill this role principally on behalf of institutions of higher learning *(id.)*, and the McCarran Act should not be extended to immunize a large segment of pension benefits from federal statutes and to permit continued discrimination.

In *Royal Drug Co., supra*, this Court commented that "the primary concern of Congress in the wake of that decision *[South-Eastern Underwriters Assn]* was in enacting legislation that would ensure that the States would continue to have the ability to tax and regulate the business of insurance." In this respect, however, the Supreme Court pointed out:

> "There is no question that the primary purpose of the McCarran-Ferguson Act was to perserve state regulation of the activities of insurance companies, as it existed before the *South-Eastern Underwriters* case." (322 U.S., n. 18 at 218).

Accord: Virginia Academy of Clinical Psychologists v. *Blue Shield of Virginia*, 624 F.2d 476, 483 (4th Cir. 1980).

TIAA is in the fixed annuity pension business. This Court appropriately should consider that New York courts have held that an annuity is not insurance as generally understood, and the sale of annuity contracts falls outside of activities considered to be insurance. *In re Newton's Estate*, 177 Misc. 877, 32 N.Y.S.2d 473 (Surr. Westch, Co., 1941), *aff'd*, 267 App. Div. 913, 48 N.Y.S.2d 332 (2nd Dep't 1941), *aff'd*, 294 N.Y. 687, 60 N.E.2d 842 (1941); *in re Sothern's Estate*, 170 Misc. 805, 14 N.Y.S.2d 509 (Surr. Ct. Ulster Co. 1938), *aff'd*, 257 App. Div 574, 14 N.Y.S.2d 1 (3rd Dep't 1939); *in re Rhodes Estate*, 197 Misc. 212, 94 N.Y.S.2d 406 (Surr. Ct., Westch. Co., 1950). *See*, 1 Appleman *Insurance Law and Practice* § 84, pp. 295-99, ns. 1-6 for cases (rev. ed. 1981). Thus, these activities are not encompassed by the McCarran Act.

The Court may also consider the authority of Deputy Superintendent, New York State Insurance Department, who has recognized that in "insurance areas where discrimination is a problem, such as social security and pension benefits," federal jurisdiction applies and "they

are beyond the reach of state regulatory authority." Lamel, *State Regulation of the Insurance Industry*, Ins. L. J. 336, 348 (1978). The fact that the Superintendent of Insurance does not seek to review the *Spirt* decision and has announced that he will abide by the results and "honor the decision" is the latest recognition of the foregoing. This is actually a recognition of No. (1) *supra*, and the authority cited by the Court of Appeals in its September 29, 1982 opinion (28a-29a).

(4) TIAA-CREF Necessarily Join With Non-Exempt Person, Including LIU And Over 3,000 Participating Employers, And Has Forfeited Any Exemption It Might Have Had

TIAA-CREF are in lock step and jointly act with LIU and each of the 3,100 or so other non-exempt, participating institutions they serve (JA146; JA172). In *Royal Drug, supra*, this Court ruled that a company in the "business of insurance" combining with "parties wholly outside the insurance industry" for an unlawful purpose forfeits any right it might have to immunity under the McCarran Act. 441 U.S. at 231-232. Accordingly, TIAA-CREF have forfeited any right to claim protection from the McCarran Act. *Royal Drug, supra*, 441 U.S. at 231-233. *Cf., Case-Swayne Co.* v. *Sunkist Growers, Inc.*, 389 U.S. 384 (1967) and *United States* v. *Borden Co.*, 308 U.S. 188 (1939) (agricultural cooperatives forfeit their immunity from the antitrust acts where they conspire with non-exempt parties); *Ramsey* v. *Mine Workers*, 401 U.S. 302, 313 (1971) and *Mine Workers* v. *Pennington*, 381 U.S. 657, 665-666 (1965) (unions forfeit their antitrust immunity where they conspire with non-exempt parties for the unlawful purpose of price fixing).

(5) Title VII May Be Construed Not To Supersede Any New York Law

The District Court held that the laws of the State of New York did not compel or encourage the discriminations (475 F. Supp. at 1312, 79a).

This ruling means that Title VII does not "invalidate, impair or supersede" any state law which is under the McCarran Act umbrella. In view of its holding on preemption, the Court of Appeals did not reach this question (30a). It observed that the Superintendent (NY) has acted to approve the future use of unisex mortality tables and that he would comply with the order entered.

See, *Norris* v. *Arizona*, 671 F.2d 330, 333 (9th Cir. 1982) which stated that the "district court has not interfered with the business of insurance." Title VII has not been construed so as to "supersede Arizona's laws." The court enjoined the use of the discriminatory tables and rejected the McCarran Act argument by concluding that all that had been done was to tell the employer [here LIU-TIAA-CREF] that it "may not offer a fringe benefit which treats an individual woman differently than an individual man."

III. TIAA-CREF ARE WITHIN THE TERM "EMPLOYER" AS DEFINED IN TITLE VII

The Court of Appeals sets forth the reasons TIAA-CREF are considered "employers" within the meaning of § 701(b) of Title VII, 42 U.S.C. § 2000e(b) which includes as employers a "person engaged in an industry affecting commerce . . . and any agent of such person." That definition ". . . is sufficiently broad to encompass any party who significantly affects access of any individual to employment opportunities, regardless of whether that party may technically be described as an 'employer' of an

aggrieved individual as that term has generally been defined at common law." (24a).

The reasoning of the Court of Appeals and the authorities for this conclusion are set forth in the September 29, 1982 opinion (24a). The Court agreed with the District Court that TIAA-CREF "exist solely for the purpose of enabling universities to delegate their responsibility to provide retirement benefits for their employees [and] are so closely intertwined with those universities [in this case LIU] that they must be deemed an 'employer' for purposes of Title VII." *(id.)* The lower court discussed the issue under "Definition of 'Employer' Under Title VII" (71a). The court found on the facts that authority, responsibility and control had been delegated to petitioners by LIU and they shared in such. They had been founded and existed solely to serve LIU and other institutions and to relieve institutions of the burden of establishing and administering the pension plans.

Manhart held two defendants in addition to plaintiffs' common law employer responsible [*Manhart*, 435 U.S. at 704, n.2; *see*, *Manhart*, 553 F.2d 581, 583 (9th Cir. 1976)]. Thus, the TIAA-CREF petition is in error (p. 17) in suggesting that *Manhart* was limited to common law relations. In fact, *Manhart* recognized that "Title VII and the Equal Pay Act *primarily* govern relations between employers and employees" (435 U.S. at 719, n.33, emphasis added), which is to say that Title VII applies to other than strict common law relations and is read in conjunction and harmony with the Equal Pay Act.

Manhart also compares the word "agent" in Title VII with the phrase "any person acting directly or indirectly in the interests of an employer in relation to an employee" in the Equal Pay Act, 29 U.S.C. § 206(d), in referring to

the defendants who were not direct, common law employers.[15]

This same language ("acting directly as an employer or indirectly in the interest of an employer in relation to an employee benefit plan") is found in ERISA, to which the plans at issue admittedly are subject. 29 U.S.C. § 1002(6). In this respect, *Lutcher* v. *Musical Union Local 47*, 633 F.2d 880 (9th Cir. 1980) cited and relied by the District Court holding on "employer," states "employment need not necessarily be direct" (at 883).

In the Court of Appeals decision in *Norris*, 671 F.2d 330 (9th Cir. 1982) the conclusion was made that the *Manhart* decision did not confine itself to employer operated funds or to the boundaries encompassing only direct activities of an employer. Certainly, if the plan falls within Title VII, the person operating it at least when "acting in the interest of an employer" in relation to "such plan, which is admitted to be a fringe benefit" and a term and condition of employment, also comes within Title VII.

> "The reasoning of *Manhart* is no less persuasive where, instead of operating a plan itself, an employer designated certain companies to operate the plan. In both cases, the plan offered by the company discriminates against women because it looks at them as a class instead of as individuals.
>
> "In addition, none of the cases subsequent to *Manhart* has found Title VII inapplicable because an employer-operated pension plan was not involved.

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[15] The Supreme Court in *Manhart* dealt with these words as covering the same point (p. 718, n. 33). TIAA-CREF in their *amicus curiae* to the Supreme Court in *Manhart* argued that the intent of Congress was to avoid two conflicting standards and any conflict should be resolved in favor of Equal Pay interpretations (TIAA-CREF Brief, pp. 31-32). Thus, the "directly or indirectly" acting test falls within the standard suggested by TIAA-CREF.

See Equal Employment Opportunity Com'n v. *Colby College*, 589 F.2d 1139 (1st Cir. 1978); *Peters* v. *Wayne State University, supra; Spirt* v. *Tchrs. Ins. & Annuity Ass'n, supra.*

"Arizona attempts to distinguish these cases [all involving TIAA-CREF] by stating that those employers took an active role in administering or developing the plan. This distinction is illusory. In this case, as in the above cases, it is clear that the adoption of th plan constitutes active participation without which the challenged program could not operate. *See Colby, supra*, 589 F.2d at 1141; *Sobel* v. *Yeshiva University*, 477 F. Supp. 1161, 1166 n.4 (S.D.N.Y. 1979); *Spirt, supra*, 475 F. Supp. at 1308-09. Arizona made the selection of certain companies as funding media. It approved participation in the plan and deducted the appropriate amount from the employee's salary. The fact that the plan is operated by a private insurance company rather than Arizona does not render *Manhart* less controlling." (671 F.2d at 344)

TIAA-CREF are within the ambit of Title VII; any suggestions that they are not is a suggestion that Title VII, *Manhart* and *Norris* can be nullified as to pension plans and discrimination and would leave discrimination in the plans for another 30 to 40 years (34a).

CONCLUSION

Respondent Spirt urges that the petition for a writ of certiorari be denied.

Respectfully submitted,

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No. 84-50

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

TEACHERS INSURANCE AND ANNUITY ASSOCIATION, AND COLLEGE RETIREMENT EQUITIES FUND,
Petitioners,
v.
DIANA L. SPIRT, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF AMERICAN COUNCIL OF LIFE INSURANCE AS AMICUS CURIAE IN SUPPORT OF THE PETITION

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QUESTIONS PRESENTED

1. Whether an order requiring the use of sex-neutral tables to calculate annuity benefit payments based on contributions made before this Court's *Norris* decision is consistent with the August 1, 1983, cut-off date prescribed in *Norris*.

2. Whether independent insurance carriers can be deemed "employers" of their insureds, thereby falling within the provisions of Title VII of the Civil Rights Act of 1964.

3. Whether Title VII supersedes the McCarran-Ferguson Act's reservation to the states of regulatory authority over the business of insurance.

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TEACHERS INSURANCE AND ANNUITY ASSOCIATION, AND COLLEGE RETIREMENT EQUITIES FUND,
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BRIEF OF AMERICAN COUNCIL OF LIFE INSURANCE AS AMICUS CURIAE IN SUPPORT OF THE PETITION

This brief is filed on behalf of the American Council of Life Insurance, as amicus curiae, in support of the petition for certiorari. Consent from counsel for all parties has been filed with the Clerk of this Court.

INTEREST OF THE AMICUS

The American Council of Life Insurance ("Council") represents the interest of 611 member life insurance companies, including most of the major life insurers in the United States. Its members currently hold more than 94 percent of the life insurance in force in legal reserve

life insurance companies in the United States. In addition, member companies account for 98.3 percent of the insured private pension plan business in the United States. Thus, the Council has a direct and immediate interest in insurance practices, in general, and in the sound administration of pension plans, in particular.

The pension industry is large and affects many individuals. At the end of 1982, 30.5 million Americans were covered by private pension plans administered by U.S. legal reserve life insurance companies. See American Council of Life Insurance, 1982 Pension Facts (1983 Update). Assets backing these plans reached $228.9 billion during that year. *Id.*

In any aspect of insurance, accurate risk classification is essential to maintaining the financial integrity of a finite fund subject to partial liquidation upon the occurrence of events such as death, retirement, or disability, which are unpredictable on an individual basis. Historically, sex-distinct actuarial tables have been used by virtually all insurance companies, including petitioners (TIAA-CREF), to classify participants for the purpose of purchasing insured pension benefits. Until this Court's decision in *Los Angeles Department of Water and Power v. Manhart*, 435 U.S. 702 (1978), sex-distinct tables were used by a few pension plans to determine the amount of each participant's periodic contributions in order to provide equal periodic pension benefits on retirement; after the *Manhart* decision, the sex-distinct tables were used only to correlate the amount of periodic benefit payments under one or more payout options to the total amount contributed to a plan by or on behalf of each retiree.

As a result of this Court's recent decision in *Arizona Governing Committee v. Norris*, 103 Sup. Ct. 3492 (1983), employers subject to Title VII who provide pension benefits may not continue to use sex as a factor in determining the amount of periodic payments to retirees under employment plans. The impact of this change on

the management and operation of pension plans will be substantial; retroactive application of the *Norris* rule could impair the reasonable expectations of many prospective retirees.

Because it is concerned about safeguarding the financial integrity of employee benefit plans as well as protecting the legitimate and justifiable expectations of welfare and pension plan participants, the Council has a direct and immediate interest in the proper interpretation and implementation of the *Norris* decision.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported in 735 F.2d 23. An earlier opinion by the Second Circuit is reported at 691 F.2d 1054 (1982). The United States District Court for the Southern District of New York issued five opinions in this case: (1) January 23, 1976 (not officially reported); (2) July 1, 1976 (reported at 416 F. Supp. 1019); (3-4) August 9 and September 12, 1979 (reported at 475 F. Supp. 1298); and (5) March 19, 1982 (reported at 93 F.R.D. 627). Each of these opinions is set forth in the Appendix to the Petition.

JURISDICTION

The judgment below was entered on May 21, 1984. The petition for certiorari was filed on July 11, 1984. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

1. Section 703(a)(1) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1) (1982), provides, in pertinent part:

It shall be an unlawful employment practice for an employer—

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . .

2. Section 2(b) of the McCarran-Ferguson Act, 15 U.S.C. § 1012(b) (1982), provides, in pertinent part:

> No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance . . .

STATEMENT

Teachers Insurance and Annuity Association ("TIAA") and College Retirement Equities Fund ("CREF") provide insurance products (principally annuities) for faculty and staff members who are employed by more than 3,400 educational institutions in the United States. More than 700,000 persons hold retirement contracts in the TIAA-CREF system.

TIAA is a non-profit, legal reserve life insurance company which was organized in 1918 by the Carnegie Foundation for the Advancement of Teaching. TIAA provides annuities especially designed for employees of academic institutions. CREF, a companion organization, was created in 1952 by a special act of the New York State Legislature in order to furnish annuities which are backed by investments other than those traditionally permitted as reserves for annuities similar to those sold by TIAA. Both TIAA and CREF are closely regulated by the New York State Insurance Department and are subject to the New York Insurance Law.

Respondent, Diana L. Spirt, is a tenured professor at Long Island University ("LIU"). LIU has adopted a

retirement plan with policies written by TIAA-CREF, in which respondent is required to participate. Under the plan, the employee contributes 5 percent of his or her yearly salary. In addition, LIU contributes 5 percent of the first $4,800 of an employee's salary and 11 percent of an employee's earnings in excess of that amount. Thus, contributions by and on behalf of similarly situated male and female employees are equal in amount.

Each contribution received by TIAA-CREF purchases retirement benefits pursuant to separate annuity contracts between TIAA-CREF and each individual participant. The contract rights vest immediately and irrevocably in the individual employee. All annuity accumulations are "portable," i.e., the employee retains his or her ownership interest in the individual account whenever he or she transfers employment, in or out of higher education.

The benefits paid out to a retired participant are directly related to the total contributions to the plan made by and on behalf of that participant. In order to price their product accurately, and to ensure their continued solvency, TIAA and CREF used sex-specific mortality tables in calculating the amount of the monthly benefits, and so advised the participants. As a consequence, female participants historically received somewhat smaller monthly payments than similarly situated male retirees, reflecting the fact that women live longer than men. Although the monthly payments were smaller for women, the aggregate amount received by the average woman was greater than that received by the average man. The actuarial values of the annuity plans have always been identical for men and women.

Pursuant to this Court's decision in *Arizona Governing Committee v. Norris*, 103 Sup. Ct. 3492 (1983), TIAA and CREF have changed their plans so that unisex tables are used to calculate periodic benefit payments correlating to premiums received on and after August 1,

1983. The issue remaining is whether annuities already earned through premiums received by TIAA and CREF before that date (or before May 1, 1980) must likewise be determined on the basis of unisex tables, thus impairing the rights of men whose eventual retirement benefits were vested before August 1, 1983.

REASONS FOR GRANTING THE WRIT

1. The Decision Below Deprives Male Policyholders of Contractual Interests Already Definitely Vested in Them

The real issue in this case is not between the respondent Spirt and LIU. The decision below imposes no financial liability on either LIU or TIAA-CREF. The issue here is, for practical purposes, between not-yet-retired male policyholders of TIAA-CREF, on the one hand, and female policyholders on the other. That issue is properly here since TIAA-CREF and LIU have a fiduciary responsibility to see that the rights of all policyholders in the case of TIAA, and employees in the case of LIU, are protected.

This Court's decisions in *Manhart* and in *Norris* turn on its conclusion that it is the *individual* who must be protected. In this case, prior to August 1, 1983, each policyholder, male or female, had a definite number of dollars held to his or her credit, and a contractual agreement that the total accumulation would be used, on retirement, to provide an annuity. It was clearly provided in the contractual papers that the annuity would be calculated on a sex-distinct basis. It is true that the contract did not provide an annuity of a predetermined number of dollars. This was for at least two reasons: *First*, the annuity was based on the aggregate number of dollars in the accumulation at the time of retirement, and this could not be predetermined, both because of variations in the amount of periodic payments credited to the account, and because of varying amounts credited to

the account from investments income; and *second*, because annuity tables are not frozen. They are subject to adjustment on the basis of experience; with respect to annuities which may be payable many years in the future, this is particularly important because, for example, of increased longevity, which has occurred in the past.

Despite the inability to determine the exact amount of future pension benefits, there was a clear contractual obligation to hold each participant's accumulation for his or her benefit, and to provide an annuity to each participant on a scientifically established annuity table, and it was clearly stated that this annuity would be based "on age and sex" of the policyholders; and sex was regularly taken into account in computing the information on prospective annuity payments which was annually made available to each policyholder.

Thus, prior to the *Norris* decision (which did not involve an insurance company) each policyholder in TIAA-CREF had a vested interest in a clearly established prospective annuity, and this annuity was agreed to be based on sex-distinct annuity tables.

The decision below does not harm TIAA-CREF or LIU. But it does take away from each male policyholder in TIAA-CREF a definite and material portion of his contracted-for annuity, and gives this amount to all women policyholders as a group. It cannot be said how much each woman policyholder will actually receive, for that will depend on how long she lives. But it is clear that this portion of what the women receive will come from the accumulations made by and for the men, and will deprive each man of a portion of the benefit which was due to him under his contract. In this connection it is relevant that the accumulations have often been made over long periods—twenty, thirty, or forty years, or more —and the contractual arrangements, including sex-based tables, were entered into long before the present question was ever raised.

That the lower court's decision results in a taking from the men—from each man—is clear and can be readily shown by an example. Suppose that TIAA-CREF (without any legislation) had reached the conclusion that, for any reason, it should change its liability to policyholders—male and female—under existing contracts from sex distinct annuity tables to unisex tables. Would it not be clear that this would have been a breach of contract, and that it could be enjoined at the suit of any one or more male policyholders, and, as well, at the suit of the New York Commissioner of Insurance? This would of course be because such action by TIAA-CREF would take away contractual rights from male policyholders and give them to women. The taking is no less real and no less severe when it is done by order of the court below. It is one thing to make such a change prospectively, as this Court clearly required in its *Norris* decision, and another thing to make the change applicable to already vested contractual rights, which is what is required by the decision of the court below.

It is currently estimated that in the case of TIAA-CREF alone, the order affirmed by the Second Circuit will require the transfer from men to women participants of $2 billion in reasonably expected benefits over the course of the affected male participants' lives. This figure, as indicated, represents the effect of the decision below on the TIAA-CREF plan alone. Without some clarification of *Norris*, other courts may accept the interpretation given that decision by the court below, causing the total economic impact of the lower court's opinion to expand substantially. This is indeed a ten billion dollar case.

The order of retroactive relief "attaches a new disability in respect to transactions . . . already past," *Lohf v. Casey*, 330 F. Supp. 356, 359 (D. Colo. 1971), *aff'd*, 446 F.2d 618 (10th Cir. 1972). The new disability is imposed on innocent people whose justifiable expectations with regard to the level of benefits they could expect to flow from their contributions will be disappointed.

The price of retroactive relief against the petitioners' plan is not made less significant (as suggested by the court below) by the fact that it will be borne by male annuitants, who are not parties to this case, rather than by the petitioners, who have a fiduciary responsibility for them.

No question is raised here as to the power of governmental authority to make the change involved here with respect to future premium payments. The issue here relates entirely to the retroactive effect of the decision of the court below. Indeed, the question was clearly decided by this Court in its judgment in the *Norris* case. Justice O'Connor, who cast the deciding vote on both aspects of the *Norris* decision, wrote—and this was specifically concurred in by Justice Powell, 103 Sup. Ct. at 3510, n.12, speaking for four members of the Court—

> For contributions collected before the effective date of our judgment, however, I would allow employers and *participating insurers* to calculate the resulting benefits as they have in the past. [Emphasis supplied.]

103 Sup. Ct. at 3512-13.

2. The Court Below Misinterpreted *Norris* When It Granted Retroactive Relief

The court of appeals recognized that, in *Norris*, this Court "made clear that it considers a judgment in a Title VII pension benefit case to have retroactive effect when that judgment, though applicable only to persons retiring after its date, affects a portion of benefits attributable to contributions made prior to its date." (Pet. App. at 4a.) Nevertheless, the court of appeals ignored this Court's determination that an award of retroactive relief "would be both unprecedented and manifestly unjust." 103 Sup. Ct. at 3509.

The court below felt that this Court proscribed retroactive application of the *Norris* decision only because it

found that retroactive application of the decision would have a serious impact "upon the employer or the plan." (Pet. App. at 7a.) The court thus disregarded the burden placed by its decision on all male participants in the plan, perhaps because they were not parties there. This failure to consider the effect of its decision in taking from one group and giving to another has no basis in reason, in this Court's decisions in *Manhart* and *Norris*, or in the policies underlying those decisions.

In *Manhart*, this Court first indicated a special sensitivity to the unique nature of insurance and pension plans and determined that a mandated change in the basis for the operation of a pension plan should be prospective only, reversing the decision of the lower court on this question. In rejecting a back-pay award to women employees, the Court underscored the harmful effects and substantial inequities that result when retroactive relief is awarded with respect to a pension obligation.[1]

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[1] In *Manhart*, the Court wrote that rules applicable to pension plans should not be applied retroactively "unless the legislature has plainly commanded the result." 435 U.S. at 721. Far from plainly commanding the retroactive relief ordered by the court below, Congress has given every indication that it also is sensitive to the unique character of pension plans, and it has identified and underlined the importance of making only gradual and prospective changes in the rules governing those plans. In passing the Employment Retirement Income Security Act of 1974, 88 Stat. 829, Congress paid careful attention to the problem of retroactivity and set a wide range of effective dates for various provisions of the new law; some of the rules did not become fully effective until this year, a decade after the law was enacted. *See, e.g.*, 29 U.S.C. § 1061(a) (1970 ed. Supp. V) (Sept. 2, 1974); 29 U.S.C. § 1031 (b)(1) (1970 ed. Supp. V) (Jan. 1, 1975); 29 U.S.C. § 1086(b) (1970 ed. Supp. V) (Dec. 31, 1975); 29 U.S.C. § 1114(c)(4) (1970 ed. Supp. V) (June 30, 1977); 29 U.S.C. § 1381(c)(1) (1970 ed. Supp. V) (Jan. 1, 1978); 29 U.S.C. § 1061(c) (1970 ed. Supp. V) (Dec. 31, 1980); 29 U.S.C. § 1114(c) (1970 ed. Supp. V) (June 30, 1984).

In *Norris*, this Court again rejected a lower court's award of retroactive relief. The relief which had been granted by the lower court in *Norris* was precisely like that affirmed by the Second Circuit in this case—that is, all future annuity payments to women were to be made equal to those made to men. Justice Powell, writing for the Court, stated that such relief was "fundamentally retroactive in nature," for "[a]nnuity payments are funded by the employee's past contributions and represent a return on those contributions." 103 Sup. Ct. at 3509-3510, n.10. The authoritative nature of this reference to the "[a]nnuity payments" receivable by male policyholders was completely overlooked by the court below.

Obviously, the decisions in *Manhart* and *Norris* reflect something more than a concern for the burdens imposed upon a plan or employer by retroactive relief; in fact, both decisions indicate an appreciation of the expectations of the insureds and a concern for the unwarranted imposition of the burdens of retroactive relief on "innocent third parties," such as men who have participated in the TIAA-CREF plan.

The Second Circuit's focus on the burden of retroactive relief upon employers or pension plans ignores the reason for this Court's refusal to impose such a burden, which is to protect the expectations of the many thousands of plan participants. There is no sound basis on which to refuse an indirect threat to those expectations through the imposition of retroactive relief upon a pension plan, while permitting a direct threat by requiring innocent plan participants to forego some portion of their anticipated benefits in order to accommodate unforeseen mandated changes in the operation of the plan.

3. The Court Below Clearly Expressed A Need For A Clarification of *Norris*

The court of appeals, directed to reconsider its decision in light of this Court's decision in *Norris*, openly expressed uncertainty and confusion as to the applicability of the *Norris* rule to grants of retroactive relief in cases involving pension plans. (Pet. App. at 7a.) Indeed, the court of appeals reinstated its prior decision only on the basis of what it presumed to be the most "plausible interpretation" of the *Norris* decision. *Id.*

This Court has more than once granted certiorari to consider the proper scope of its holding in another Title VII case, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). In *Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978), the Court granted certiorari "to consider important questions raised by this case regarding the exact scope of the prima facie case under *McDonnell Douglas* and the nature of the evidence necessary to rebut such a case." *Id.* at 569. Five months later, in *Board of Trustees of Keene St. Col. v. Sweeney*, 439 U.S. 24, 25 (1978), the Court found that a lower court had "imposed a heavier burden on the employer than *Furnco* warrant(ed)", and again handed down a clarifying opinion.

This case, as did *Furnco*, raises important questions about a prior decision of this Court; as in *Board of Trustees of Keene St. Col.*, this case presents a situation where the lower court has imposed a burden heavier than that warranted by a previous decision of this Court. The significance of the burden imposed by the Second Circuit's interpretation of *Norris*, and the far-reaching impact of the decision, are persuasive evidence of the need for a clarifying opinion.

4. The Decision Below Conflicts With the Decision of Another Court of Appeals On the "Employer" Question, and Presents the Insurance Industry With Confusion and Uncertainty On Both the "Employer" and McCarron-Ferguson Act Questions

Even apart from the potential economic effect of the retroactive relief ordered below, the decision of the court of appeals confronts the entire insurance industry with confusion and uncertainty in two respects.

a. *The "Employer" Question*

First, the court below affirmed a radical expansion in the scope of Title VII by permitting its application to independent third party insurers such as petitioners. The Second Circuit's holding that TIAA-CREF "are so closely intertwined" with the universities which adopt retirement plans with policies written by TIAA-CREF as to deem the insurers "employers" within the meaning of Title VII (Pet. App. at 24a) is in direct conflict with the Sixth Circuit's holding in *Peters v. Wayne State University*, 691 F.2d 235 (1982). In *Peters*, the court reversed a finding that TIAA-CREF were "employers" subject to Title VII, correctly noting that TIAA-CREF were merely insurance companies providing a service to educational institutions, and adding that "[a]n insurance company is not bound by Title VII because it furnishes its services to a Title VII employer." (Pet. App. at 154a.)

It is, of course, clear that TIAA-CREF had nothing to do with hiring the employees of Long Island University, and that it has no power to fix their pay, or to terminate their employment. In such a situation, the English language is not broad or flexible enough to make TIAA-CREF an employer of these persons, who are clearly employees of Long Island University and not of its wholly independent and separate insurance carrier.[2]

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[2] This Court's recent decision in *Washington Metropolitan Area Transit Authority v. Johnson*, No. 83-747 (June 26, 1984), is not

The conflicting decisions in the Second and Sixth Circuits present a substantial problem to insurance companies, which calculate the rates they charge and the benefits they pay with reference to the risks they expect to bear. The ability of insurance companies to measure their exposure to risk is now significantly hampered by the uncertainty as to whether they become subject to Title VII merely by their association with Title VII employers. The confusion generated by the conflicting decisions in the courts of appeals on this issue should be resolved.

b. *The McCarran-Ferguson Act Question*

The second area of uncertainty raised by the decision below is the Second Circuit's application of Title VII to the business of insurance despite the McCarran-Ferguson Act's explicit reservation of regulatory authority in this area to the states. The Second Circuit has thus interpreted Title VII in a manner which "revolutionize(s) the insurance and pension industries" without any regard to the care taken by this Court to avoid precisely such a result. *Manhart*, 435 U.S. at 717.

No insurance company was a party to *Manhart*, which involved an employer-operated plan, or to *Norris*, which involved a state-administered plan. The court below was

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applicable here. In that case, a broad construction was given to the word "employer" when a contractor was held to be entitled to the protection given to an employer under a workmen's compensation statute. There the contractor had provided insurance coverage for all employees, including those of subcontractors. The Court held that the contractor, having provided the protection for all employees on the project, was entitled to the corresponding protection given by the statute to employers. The distinction lies in the fact that the decision in no way indicates that the *insurance carrier* was the employer of the subcontractor's employees.

therefore acting without any actual decision by this Court when it decided that Title VII could pre-empt state regulatory authority over the business of insurance. (Pet. App. at 29a.)

The McCarran-Ferguson Act was passed in response to this Court's decision in *United States v. South-Eastern Underwriters Assn.*, 322 U.S. 533 (1944), in which the antitrust laws were held applicable to the business of insurance. In the wake of that decision, there was considerable uncertainty in the insurance industry concerning the validity of state insurance laws, and "[s]ome insurance carriers were reluctant to comply with state regulatory authority, fearing liability for their actions." *Norris*, 103 Sup. Ct. at 3507, n.5 (citing H.Rep. No. 143, 79th Cong., 1st Sess., 2 (1945)). Congress resolved that uncertainty in the McCarran-Ferguson Act by declaring "that the continued regulation and taxation by the several states of the business of insurance is in the public interest . . ." (15 U.S.C. § 1011 (1982)), and that "No Act of Congress shall be construed to invalidate . . . any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act *specifically* relates to the business of insurance." 15 U.S.C. § 1012(b) (1982) (emphasis supplied).

Now, the very uncertainty which, in part, prompted Congress to pass the McCarran-Ferguson Act again confronts the insurance industry as a result of the decision below. Insurance carriers must once again assess their liability under federal law for complying with state insurance regulations, just as they did in the wake of *South-Eastern Underwriters*; the inevitable undermining of state authority in this area is directly contrary to the clearly expressed intent of Congress in passing the McCarran-Ferguson Act.

The uncertainty resulting from the decision below and its conflict with the decision of another court of appeals and with the purpose and policy of a federal statute are

all evidence of the need for review of the Second Circuit's decision.

CONCLUSION

For the reasons set forth above and for the additional reasons advanced in the Petition in this case, the Petition should be granted.

Respectfully submitted,

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No. 84-50

In the Supreme Court of the United States

OCTOBER TERM, 1984

TEACHERS INSURANCE AND ANNUITY ASSOCIATION AND COLLEGE RETIREMENT EQUITIES FUND, PETITIONERS

v.

DIANA L. SPIRT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the relief mandated by the courts below is appropriate.

2. Whether petitioners are "employers" within the meaning of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e(b).

3. If petitioners are employers, whether the McCarran-Ferguson Act, 15 U.S.C. 1012(b), precludes application of Title VII to the retirement plans petitioners offer.

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OPINIONS BELOW

The opinion of the court of appeals on remand (Pet. App. 1a-9a) is reported at 735 F.2d 23. An earlier opinion of the court of appeals (Pet. App. 11a-37a) is reported at 691 F.2d 1054. The district court's opinion of July 1, 1976 (Pet. App. 43a-54a) is reported at 416 F. Supp. 1019; its opinions of August 9 and September 12, 1979 (Pet. App. 55a-92a) are reported at 475 F. Supp. 1298; its opinion of March 19, 1982 (Pet. App. 93a-142a) is reported

at 93 F.R.D. 627; and its opinion of January 23, 1976 (Pet. App. 39a-42a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 143a-144a) was entered on May 21, 1984. The petition for a writ of certiorari was filed on July 11, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Respondent Diana Spirt, a tenured professor at Long Island University (LIU), a private educational institution, brought this action in the United States District Court for the Southern District of New York in 1974. She alleged, inter alia, that petitioners' use of sex-segregated mortality tables, which result in the payment to women of lower monthly retirement benefits than are paid to similarly situated men, violated Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e *et seq.* The Equal Employment Opportunity Commission intervened in this case in 1982 (Pet. App. 99a).

Petitioners are nonprofit organizations, incorporated in the State of New York, that provide retirement and insurance plans for the employees of educational institutions, including LIU (Pet. App. 13a, 56a). Participation in petitioners' plans is limited to colleges, universities, independent schools, and other nonprofit educational or research institutions (*id.* at 56a). Petitioner Teachers Insurance and Annuity Association (TIAA), organized in 1918 by the Carnegie Foundation for the Advancement of Teaching, offers what are in form fixed annuities for retirement

plan participants. Petitioner College Retirement Equities Fund (CREF), a companion corporation, was established in 1952 to permit investment in common stock; CREF offers plan participants variable annuities. *Id.* at 13a-15a. By 1977, more than 85% of all private, four-year colleges and universities and more than 40% of all public colleges and universities had adopted retirement plans managed by petitioners (*id.* at 13a). At that time, more than 400,000 employees of approximately 2,800 participating institutions were covered by the TIAA-CREF system (*ibid.*).

Participation by educational institutions in the TIAA-CREF system is "normally established by a resolution of the board of trustees of a participating institution" (C.A. App. 173). In 1955, the trustees of LIU passed a resolution adopting the TIAA-CREF plan at issue here and establishing the conditions under which university employees would participate in the plan (Pet. App. 56a-57a; C.A. App. 188-193). The resolution requires that tenured faculty members like respondent Spirt participate in the LIU plan (Pet. App. 13a; C.A. App. 188). Each employee must contribute 5% of his or her salary to the plan; LIU contributes an additional sum in the amount of 5% of the first $4,800 of an employee's yearly salary and 11% of yearly earnings in excess of $4,800 (Pet. App. 14a).

Petitioners accumulate and invest contributions forwarded by LIU to employees' accounts. When an employee is qualified and wishes to begin receiving annuity benefit payments (generally at retirement), he or she "settles" his or her contract with petitioners (C.A. App. 176-177). At the point of settlement, all similarly situated TIAA-CREF annuitants, male or

female, have identical accumulations (*id.* at 178). Each employee, in return for the contributions forwarded to petitioners on his or her behalf, receives an individual contract: a TIAA Deferred Retirement Annuity Contract (*id.* at 174, 194-199) or a CREF Deferred Retirement Unit-Annuity Certificate (*id.* at 174, 502-507).

Petitioners have historically used sex-based mortality tables in calculating the benefits participants receive from annuities, because women as a class live longer than men (Pet. App. 57a). As a result, "female participants in the plans receive smaller monthly [retirement] payments than male participants of the same age, years in the plans, salary, and rate of contribution" (*ibid.*). However, prior to settlement of an employee's account petitioners make no contractual commitment (with one exception that has no practical significance, see pages 5-6, *infra*) to distribute benefits to annuitants on a sex-differentiated basis (Pet. App. 5a-6a, 34a-36a, 87a & n.28, 89a-90a).

The CREF deferred annuity certificates contain no guaranty that the annuitant will receive any dollar amount in future benefits or that future benefits will be distributed on a sex-differentiated basis (C.A. App. 502-507). CREF specifically informs participants that it provides no dollar guaranties with respect to annuity payments and assumes no investment risk (Weyand Affidavit, Exh. OO, at 1; C.A. App. 502).[1] CREF certificates provide that each premium

[1] "Weyand Affidavit" refers to the affidavit of Ruth Weyand, attorney for the EEOC, filed in the court of appeals in support of the EEOC's motion to reinstate judgment.

purchases "Accumulation Units," which at settlement can be either (1) exchanged for "Annuity Units" that will provide a variable annuity or (2) used to purchase a TIAA annuity (C.A. App. 502-504). CREF does not promise that sex-based mortality tables will be used in converting "Accumulation Units" to "Annuity Units" or in calculating benefits payable by TIAA annuities (Pet. App. 87a & n.28, 89a-90a & n.4).[2]

Petitioner TIAA is also able to distribute benefits to retirees on a sex-neutral basis without violating any contractual commitment. Unlike the CREF certificate, the TIAA Deferred Annuity Contract contains a sex-differentiated contractual commitment, in the form of a rate schedule setting forth annual dollar amounts of single life annuity benefits that specified contributions will ultimately provide to recipients, according to sex and retirement age. However, the dollar amounts that appear in that rate schedule are calculated on the basis of a 2-½% annual return on the contribution amount. Because this guaranteed return on investment is far below TIAA's actual rate

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[2] The only certificate provision relating to the number of Annuity Units obtained is that "[t]he number of Annuity Units and their current dollar value will be determined in accordance with the Rules of the Fund, using actuarial methods" (C.A. App. 504). The deferred annuity contracts specifically provide that the Trustees of CREF may amend or add to the Rules of the Fund from time to time (*id.* at 506). Pursuant to this provision, the trustees on several occasions have altered the formula for converting Accumulation Units into Annuity Units by changing the mortality table used (*id.* at 513, 546-549; EEOC Statement, Exh. AAA at 1-2). "EEOC Statement" refers to the Statement of EEOC of Material Fact as to Which No Genuine Dispute Exists, filed in the district court.

of return on investments, the guaranteed rate has no practical significance. Pet. App. 35a; C.A. App. 582-585. TIAA has acknowledged that "all TIAA payout contracts issued since 1941 are receiving total payments in excess of contractual guarantees" (EEOC Statement, Exh. P, letter of TIAA/CREF to EEOC, Apr. 10, 1980, at 2, para. 3).

The TIAA guaranteed rate schedules have been effectively displaced by two features of the TIAA system: (1) the use of a single premium immediate annuity (SPIA) rate as the basis for the settlement guaranty at the time of retirement (C.A. App. 583) and (2) the calculation of "total benefit payments" by a dividend formula (*id.* at 584-586; Weyand Affidavit, Exh. QQ, Answers 42(a) and (b) and 48 of TIAA to Spirt Interrogatories). Each TIAA deferred annuity contract issued since January 1, 1948, has contained a "more favorable payment" provision, which entitles the participant to receive periodic benefits at the then-current rate for single premium immediate annuities issued by TIAA if at the time of settlement the SPIA rate provides higher benefits than the guaranteed rate schedule (C.A. App. 197, 198, 199, 501, 582-583; EEOC Settlement, Exh. N, letter of TIAA/CREF to EEOC, Feb. 19, 1980, at 1, para. 1). For more than 20 years the SPIA rate has been higher than the guaranteed schedule rate (C.A. App. 582-585, 595-598). Although TIAA in practice has calculated the SPIA rates on the basis of sex-differentiated mortality tables, it has made no contractual commitment to use sex-differentiated rates. See EEOC Statement, Exh. N, letter of TIAA/CREF to EEOC, Feb. 19, 1980, at 2-4; Pet. App. 5a-6a, 34a-35a.

Moreover, for more than 20 years TIAA earnings have so greatly exceeded the SPIA rate that the

actual amount of periodic benefits TIAA pays to all retirees has been computed on the basis of a dividend formula adopted on an ad hoc basis each year. Although each benefit check designates a portion of the amount of the check as representing guaranteed benefits and the remainder as dividends, the total is actually computed by use of the dividend formula without reference to either the rate schedule guaranty or the SPIA guaranty. C.A. App. 584-586, 595-598; and see tables at *id.* at 528-529, 531-533. Use of the dividend formula has resulted in payment of benefits greatly in excess of those provided by either the rate schedule or the SPIA rates (*id.* at 585-586, 595-598).[3] Although TIAA in the past has used sex-based mortality tables as a basis for distribution of dividends (C.A. App. 182, 200), there is no contractual provision that requires it to do so. See Pet. App. 5a-6a, 34a-35a, 87a & n.28.

2. In 1979, the district court granted summary judgment in favor of respondent Spirt against LIU and petitioner CREF (Pet. App. 55a-92a, 147a-148a). The court held, on the basis of this Court's decision in *Los Angeles Dep't of Water & Power* v. *Manhart*, 435 U.S. 702 (1978), that LIU and CREF had violated Title VII by using sex-segregated mor-

[3] TIAA's net rate of return on total invested assets has increased each year since 1953, from 3.48% in 1953 to 10.73% in 1982 (C.A. App. 592; EEOC Statement, Exh. AA, 1978 Annual Report at 17; Weyand Affidavit, Exh. GG, 1979 Annual Report, at 12; Exh. HH, 1980 Annual Report at 5; Exh. II, 1981 Annual Report at 9; Exh. JJ, 1982 Annual Report at 12). The dividends paid by TIAA in 1980 were so large that the typical participant who retired within the preceding 10 years received benefit payments that were 90% to 180% more than the rate schedule guaranty (compare lines 1 and 6 at C.A. App. 595-598; and see *id.* at 584-585).

tality tables that resulted in payment of lower monthly retirement benefits to women than to similarly situated men (Pet. App. 68a-71a).

The district court found that LIU and other educational institutions had "delegated their responsibility for and control over employee annuity plans to TIAA and CREF;" that such plans were an "aspect of employee compensation;" and that petitioners were therefore employers within the meaning of Title VII (Pet. App. 71a-73a). The court also held (*id.* at 57a-64a) that TIAA, although otherwise an employer within the meaning of Title VII, was in the "business of insurance" and therefore was insulated from Title VII liability by the McCarran-Ferguson Act, 15 U.S.C. 1011 *et seq.* Since CREF assumed no investment risk, the court held that it was not in the business of insurance for purposes of the McCarran-Ferguson Act and was therefore subject to Title VII (Pet. App. 61a).

The district court postponed implementation of relief until the end of the then-current school year (Pet. App. 87a-88a). The court enjoined CREF from using sex-segregated mortality tables in calculating annuity benefits for persons who retire on or after May 1, 1980 (*id.* at 86a, 88a, 148a). In addition, it enjoined LIU from contributing to, or requiring its employees to contribute to, on or after June 1, 1980, any retirement program that uses sex-segregated mortality tables in calculating periodic benefits for persons who retire after that date (*ibid.*).[4] The court found that no male had any

[4] Petitioners' compliance with the injunctive provisions of the district court's orders and judgment has been stayed pending appeals through a series of stipulated orders. The order of March 29, 1982, provides that if the judgment is

contractual right to have sex-differentiated tables used for conversion of CREF accumulation units into annuity units and that the remedy was not inequitable because no male had any fixed expectations as to the amounts he would receive as benefits from CREF (*id.* at 87a & n.28, 89a-91a). The court also concluded that its order was not impermissibly retroactive within the meaning of this Court's decision in *Manhart*, because "the relief granted in [this] case will not involve any unanticipated payments by CREF which would force it to meet unchanged obligations with diminished assets. Rather the relief granted in this case will merely vary the future allocation and distribution of an unaffected amount of assets." Pet. App. 89a.

3. The court of appeals affirmed the district court's holding that petitioners' use of sex-distinct mortality tables violated Title VII (Pet. App. 19a-24a). It agreed as well "that [petitioners], which exist solely for the purpose of enabling universities to delegate their responsibility to provide retirement benefits for their employees, are so closely intertwined with those universities (in this case LIU), that they must be deemed an 'employer' for purposes of Title VII" (Pet. App. 24a).

The court of appeals affirmed the district court's holding that CREF, as a variable annuity company, was not in the business of insurance within the meaning of the McCarran-Ferguson Act (Pet. App. 26a-27a). However, it reversed the district court's holding as to TIAA. The court of appeals concluded

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affirmed, "the rights of all parties shall be determined as if the injunctive provisions * * * had been in full force and effect at all times since May 1, 1980 as to CREF and June 1, 1980 as to LIU." C.A. App. 793. The court of appeals indicated that the provisions of that order would govern with respect to TIAA as well. Pet. App. 37a.

(*id.* at 28a) that "the historical context, the legislative history, and judicial interpretations of that history, [establish] that Congress, in enacting a statute primarily intended to deal with the conflict between state regulation of insurers and the federal antitrust laws, had no intention of declaring that subsequently enacted civil rights legislation would be inapplicable to any and all of the activities of an insurance company that can be classified as 'the business of insurance.'" The court concluded that, in any event, Section 708 of Title VII, 42 U.S.C. 2000e-7, explicitly preempted state law to the extent the latter might authorize petitioners' discriminatory system (Pet. App. 29a-30a).

Finally, the court of appeals approved and extended to TIAA the district court's grant of injunctive relief precluding use of sex-distinct tables in calculating periodic retirement benefits for persons who retire on or after May 1, 1980 (Pet. App. 30a-37a). It also affirmed the relief awarded against LIU (*id.* at 31a). The court noted that the relief was appropriate in view of the facts that "[t]he equalization of the amount of monthly payments to be received by similarly-situated male and female employees can be calculated so as not to change the total anticipated obligations of [petitioners]" (*id.* at 34a); that the alteration in the amount of future benefits would not alter any settled expectations of male participants and would likely reduce the benefits of only 40% of future male retirees, by 1% to 8% (*id.* at 36a & n.12); and that this Court's decision in *Manhart*, as well as the filing of this and other suits, put petitioners on notice that their method of calculating retirement benefits might be illegal (*id.* at 32a-33a).

4. TIAA-CREF and LIU filed petitions for a writ of certiorari with this Court (Nos. 82-791 and

82-913). On July 6, 1983, the Court granted certiorari, vacated the judgment of the court of appeals, and remanded for further consideration in light of this Court's decision in *Arizona Governing Committee* v. *Norris*, No. 82-52 (July 6, 1983). In *Norris*, the Court held that use of sex-based mortality tables to provide a female employee with a lower monthly annuity benefit than that provided to a similarly situated male employee who has contributed the same amount of his compensation constitutes a violation of Title VII. See slip op. 5-17 (Marshall, J.); slip op. 2-3 (O'Connor, J.). However, the Court reversed an order that would have required the employer, the State of Arizona, to provide additional funds to a deferred compensation plan in order to bring the level of benefits payable to women up to the level of benefits contractually guaranteed to similarly situated men. See slip op. 11-13 (Powell, J.); slip op. 3-5 (O'Connor, J.). While the Court recognized that "retroactive relief is normally appropriate in the typical Title VII case" (slip op. 11 (Powell, J.)), it declined to apply its holding retroactively to require equalization of benefits derived from contributions collected prior to its decision. The Court noted that an award of retroactive relief would impose a heavy financial burden on employers and could jeopardize the stability of pension funds by requiring disbursements of "greater annuity benefits than the collected contributions [in the fund could] support." Slip op. 4-5 (O'Connor, J.); slip op. 12-13 (Powell, J.).

Following the decision in *Norris*, petitioners revised their method of calculating retirement benefits so that future contributions would purchase lifetime benefits on a sex-neutral basis. See Pet. 8. Petition-

ers continued to determine benefits derived from pre-August 1, 1983, contributions on a sex-distinct basis (*ibid.*).

5. On remand, the court of appeals analyzed the opinions in *Norris* and concluded that this Court's limitation on relief in that case did not call into question the relief previously ordered in this case (Pet. App. 4a-8a). The court of appeals concluded that "[t]he premise of the *Norris* ruling against retroactivity—that equalization of women's benefits requires the employer or the plan to pay out extra sums of money—is inapplicable to the case before us" because of the "fundamental difference between the plan in *Norris* and the TIAA-CREF arrangements" (Pet. App. 5a). The court of appeals noted that the deferred compensation plan in *Norris* guaranteed a certain stream of income during retirement and therefore depended on the existence of adequate reserves to fund pensions (Pet. App. 5a, quoting *Norris*, slip op. 4-5 (O'Connor, J.)), whereas "the TIAA-CREF plans do not guarantee retirees 'a certain stream of income'" (*ibid.*). The court of appeals observed that in *Norris* equalization could be accomplished only by either reducing the annuity contractually guaranteed to males or requiring the State of Arizona to pay additional amounts into the plan (Pet. App. 7a-8a). Since petitioners provided benefits "based on investment results" in amounts "not ascertainable," the court concluded that equalization "need not be rejected because of any fear that either the employer or [petitioners] will be burdened with any additional financial obligations" (*id.* at 6a).

The court of appeals did note that under its prior order there could be some financial burden on TIAA

if in any year the rate of return on its investments were insufficient to meet the 2½% guaranty provided by the TIAA rate schedule (Pet. App. 9a). The court of appeals therefore directed the district court to modify its judgment "to provide that unisex tables need not be used in calculating the portion of benefits attributable to pre-judgment contributions to whatever extent may be necessary in any year to ensure that the use of such tables will not impose added financial burdens upon the employer or TIAA beyond those resulting from the obligation to pay benefits reflecting a 2½% return on investment" (*ibid.*).

ARGUMENT

1. Petitioners contend (Pet. 10-16) that the relief ordered by the court of appeals is inconsistent with this Court's decision in *Arizona Governing Committee* v. *Norris*, No. 82-52 (July 6, 1983), to the extent it requires them to equalize benefits that are based on contributions made before August 1, 1983. They suggest that *Norris* established a per se rule of broad applicability that pre-August 1, 1983, contributions may be used to purchase sex-distinct benefits. In addition, petitioners contend that the relief ordered in this case is inconsistent with the equitable principles underlying the *Norris* decision.

The EEOC argued below that *Norris* did not establish a rule for relief that is automatically transferable to all cases involving sex discrimination in pension plans. Instead, the EEOC urged that the Court's non-retroactivity ruling in *Norris* was based on its concern that requiring employers to equalize benefits by "topping up" women's benefits would be inequitable in the circumstances of that case because it would impose a very significant unanticipated fi-

nancial burden on state and local governments and could threaten the solvency of pension funds. The EEOC pointed out that, in contrast to the employer in *Norris*, petitioners could equalize benefits of men and women without incurring any additional financial burden, since they could redistribute benefits without violating any contractual commitment to beneficiaries (see pages 4-7, *supra*).

Petitioners do not deny that the relief awarded by the court of appeals will not impose any additional financial burden on them. They contend only that it would be unfair to individual male annuitants if petitioners were required to pay benefits based on sex-neutral tables when those benefits are funded from pre-*Norris* contributions. However, both courts below found that such relief would not require petitioners to violate any contractual commitment. See Pet. App. 5a-6a, 34a-36a, 87a & n.28, 89a-90a.[5] As the description in the Statement (pages 4-7, *supra*) indicates, the record supports that finding. In any event, such a fact-bound conclusion would not warrant review by this Court. See, *e.g.*, *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635 (1967); *Graver Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 275 (1949).[6]

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[5] The court of appeals expressly modified its judgment to ensure that petitioner TIAA would not be required to violate any contractual commitment or incur any additional financial burdens as a result of paying benefits on a sex-neutral basis. See Pet. App. 9a.

[6] Moreover, we question petitioners' suggestion (Pet. 16) that the relief ordered by the court of appeals would constitute a "severe" inequity for men. It appears that the majority of male beneficiaries of TIAA-CREF plans will not be adversely affected by the court of appeals' decision because they

Petitioners do not cite any decision that has interpreted *Norris* in a manner contrary to the court of appeals' decision in this case. Moreover, since the court of appeals' holding with respect to relief depends to a large extent on the unique features of the TIAA-CREF plans, it is unlikely that any conflict will arise in the future.[7] In these circumstances, we

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have chosen the option of survivor benefits. See Pet. App. 6a, 36a; C.A. App. 550. Moreover, since 80% of the funds accumulated by TIAA-CREF belong to male participants (EEOC Statement, Exh. P, para. 5, at 3), the effect of equalizing benefits between men and women is not very great for any single male beneficiary. The court of appeals concluded that use of sex-neutral tables for payment of benefits would result in receipt by male beneficiaries of benefits only "slightly lower than whatever they would have been under gender-distinct tables" (Pet. App. 8a). In addition, the court reviewed TIAA-CREF literature and concluded that male participants could not have had any meaningful expectation of receiving benefits based on sex-distinct mortality tables (*id.* at 34a-37a). We note that no male beneficiaries have intervened to contest the terms of the relief ordered by the courts below in this case.

[7] Petitioners suggest (Pet. 12) that if the Court does not grant review there are likely to be inconsistent rulings in cases now pending in other courts. If this should occur, the parties can ask the Court to grant review and resolve the conflict. In fact, the district court concluded that, as a practical matter, the decision in this case would require petitioners to change their practices on a nationwide basis. See Pet. App. 52a. Thus, the issue of relief would be rendered moot in other cases pending against petitioners. Moreover, petitioners' home offices are in New York; their contracts are made and performed in New York; and all benefits are payable in New York. See C.A. App., para. 18, at 196, para. 19 at 507. Thus, the judgment of the court of appeals in this case appears effectively to bind petitioners in any event with respect to the entire TIAA-CREF accumulation funds. Since other pension plans presumably have characteristics that are different from

believe the court of appeals' holding with respect to relief is not of sufficient general importance to warrant review by this Court.

2. Petitioners also seek review of the court of appeals' holding that they are employers within the meaning of Title VII (Pet. 16-17).[8] They contend primarily that that holding conflicts with the decision of the Sixth Circuit in *Peters* v. *Wayne State University*, 691 F.2d 235 (1982), vacated and remanded, No. 82-794 (July 6, 1983), remanded, 718 F.2d 1100 (6th Cir. 1983). In the brief we filed when this case previously was before this Court, we suggested that review of this issue might be warranted because of the conflict between the decisions in this case and *Peters*. However, following the decision in *Norris*, the Court vacated the judgment in *Peters*, and the Sixth Circuit remanded to the district court, where the case is now pending. Thus, at the present time there is no conflict among the courts of appeals on this issue.[9]

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those of petitioners' plans, and since no other courts have yet issued post-*Norris* rulings on relief, it is not at all clear that the decision below would conflict with decisions in cases pending against other defendants.

[8] Section 701(b) of Title VII, 42 U.S.C. 2000e(b), defines the term "employer" as "a person engaged in an industry affecting commerce * * * and any agent of such a person." Cf., *e.g.*, *Falk* v. *Brennan*, 414 U.S. 190, 195 (1973) (Fair Labor Standards Act); *Bartels* v. *Birmingham*, 332 U.S. 126, 130 (1947) (Social Security Act); *NLRB* v. *Hearst Publications, Inc.*, 322 U.S. 111, 124 (1944) (National Labor Relations Act).

The EEOC argued below that petitioners are employers within the meaning of Title VII.

[9] It is unlikely that the conflict with *Peters* will recur. The Court's decision in *Norris* clearly binds colleges and universi-

Moreover, the court of appeals' holding on this issue (like its holding with respect to relief) is largely tied to the facts of this case, in particular the unique character of petitioners' relationship with the educational institutions they serve and the nature of the annuities offered. The court of appeals concluded that petitioners exist solely for the purpose of enabling employer universities to delegate their responsibilities to provide retirement benefits for their employees and are "closely intertwined with those universities" (Pet. App. 24a). Unlike commercial insurance companies, petitioners do not also market their annuities to individual purchasers. In addition, unlike commercial insurance companies, which normally lack discretion to vary the specific dollar amount of the periodic benefits paid to a particular individual, petitioners have promised only to provide an annuity that pays at least the rate schedule benefits (in the case of TIAA) or benefits that vary depending on the success of a portfolio of securities (in the case of CREF). As a practical matter, the actual size of the benefits and the relative distribution between men and women is subject to the discretion of petitioners and is fixed only at the time of retirement. See pages 3-7, *supra*. In these circum-

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ties prospectively; as a practical matter, petitioners must abandon use of sex-based mortality tables in the future, so that the educational institutions they serve will be in compliance with *Norris*. With respect to pre-*Norris* contributions, petitioners would, as a practical matter, be required to follow the decision below on a nationwide basis. See pages 15-16 note 7, *supra*.

Of course, if a conflict on this issue should reemerge, there will be opportunity to ask this Court to grant review to resolve the conflict at that time.

stances, it is unlikely that resolution of petitioners' status under Title VII would have any broad application to other providers of retirement and insurance plans. Moreover, petitioners themselves have revised their practices to comply with *Norris* in the case of post-August 1, 1983, contributions, so the question has practical significance for them only with respect to the retroactivity question they seek to present in this case. Accordingly, for the same reasons the latter issue does not warrant review by this Court in the absence of a conflict, the "employer" issue similarly does not warrant review.

3. Petitioners also contend (Pet. 18-21) that the court of appeals erred in concluding that the McCarran-Ferguson Act does not bar application of Title VII to them.[10] This question is of limited importance because of Title VII's undoubted applicability to the

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[10] Section 2(b) of the McCarran-Ferguson Act, 15 U.S.C. 1012(b), provides in pertinent part:

> No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance * * *.

The EEOC argued below that nothing in the McCarran-Ferguson Act prevented Congress from thereafter preempting any state law that requires or allows any act in violation of Title VII. The EEOC noted, inter alia, that Section 708 of Title VII, 42 U.S.C. 2000e-7, provides:

> Nothing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter.

universities themselves. Accordingly, since there is no conflict among the circuits on this point,[11] we believe this aspect of the court of appeals' decision also does not warrant further review.

Moreover, while the court of appeals found it unnecessary to reach the question (see Pet. App. 30a), it is doubtful that there is any substantial conflict between Title VII and the requirements of New York insurance law in this case. The State of New York has proceeded expeditiously in allowing insurance companies to implement the sex-neutral standards required by *Norris*. The New York State Insurance Department has advised insurers of an accelerated approval procedure designed to allow them to provide sex-neutral policies in compliance with the August 1, 1983, date set by *Norris*. Circular Letter No. 14

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[11] Every other federal court that has considered the issue has agreed with the court of appeals in this case that Title VII bars discrimination by an employer or its agent even if such discrimination is sanctioned by state insurance laws. See *Women in City Government United* v. *City of New York*, 515 F. Supp. 295, 302-306 (S.D.N.Y. 1981); *EEOC* v. *Wooster Brush Co.*, 523 F. Supp. 1256, 1264-1267 (N.D. Ohio 1981), aff'd in part and rev'd in part on other grounds, 727 F.2d 566 (6th Cir. 1984); *Hannahs* v. *New York State Teachers' Retirement System*, 26 Fair Empl. Prac. Cas. (BNA) 527, 532-533 (S.D.N.Y. 1981); *Peters* v. *Wayne State University*, 476 F. Supp. 1343, 1350-1351 (E.D. Mich. 1979), rev'd on other grounds, 691 F.2d 235 (6th Cir. 1982), vacated and remanded, No. 82-794 (July 6, 1983), remanded, 718 F.2d 1100 (6th Cir. 1983).

Petitioners suggest (Pet. 19-20) that the court of appeals' decision conflicts with *Cochran* v. *Paco, Inc.*, 606 F.2d 460 (5th Cir. 1979). However, *Cochran* did not involve Title VII or any other labor or civil rights legislation. Rather, it involved the relationship between the McCarran-Ferguson Act and the Truth in Lending Act, 15 U.S.C. 1601 *et seq.*

(July 25, 1983). In addition, the Department has specifically informed insurers subject to its jurisdiction that policies issued under plans subject to *Norris* and Title VII "which utilize gender distinct premium calculations or benefit payments must be amended." Amplification of Circular Letter No. 14 (Sept. 7, 1983).[12] These communications suggest that there is unlikely to be any substantial conflict between the requirements of Title VII, as interpreted by the courts, and the requirements of New York insurance law.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
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Equal Employment Opportunity Commission

SEPTEMBER 1984

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[12] We are lodging copies of Circular Letter No. 14 and the amplification thereto with the Clerk of the Court and providing copies to counsel for the parties.

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No. 84-50

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

TEACHERS INSURANCE AND ANNUITY ASSOCIATION and COLLEGE RETIREMENT EQUITIES FUND,

Petitioners,

- against -

DIANA L. SPIRT, et al.,

Respondents.

BRIEF OF AMICUS CURIAE THE CITY OF NEW YORK

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INTEREST OF AMICUS CURIAE

The City of New York submits this brief in support of the petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit. The decision of the Second Circuit appears to alter this Court's August 1, 1983 compliance date

for equalizing male and female benefits paid by employer-sponsored pension plans and may have a substantial financial impact upon The City of New York.

The City is a defendant in a class action brought pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C., section 2000-e, et seq., and other laws, challenging the use of gender-based mortality tables in the calculation and payment of contributions and benefits by and to members of the New York City Employees' Retirement System. Women In City Government United, et al. v. City of New York, et al., 75 Civ. 2868 (MJL) (S.D.N.Y.). In 1981, the District Court found that the City's practices violated Title VII under the rationale of Los Angeles Department of Water and Power v. Manhart, 435 U.S. 702 (1978), and ordered a trial to determine the appropriate remedy. Women In City Government United, et al. v. City of New York, et al., 515 F. Supp. 295 (S.D.N.Y. 1981). The matter is scheduled to go to trial before a Special Master

later this year.

The Second Circuit's decision will influence the outcome of Women In City Government on the issue of whether the City must equalize benefits for those who retired prior to August 1, 1983, the effective date of this Court's opinion in Arizona Governing Committee v. Norris, 463 U.S. _____, 103 S.Ct. 3492, 77 L. Ed. 1236 (1983). The Chief Actuary of the City of New York has estimated the potential cost to the City's five retirement systems of future benefits to pre-August 1, 1983 retirees at $288 million, with benefits retroactive to 1972 costing as much as several hundred million dollars more. The City of New York is required by law to amortize any unfunded liabilities of its retirement systems which could result from a retroactive award of benefits.

REASONS FOR GRANTING THE WRIT

RETIREMENT BENEFITS MUST BE EQUALIZED ONLY FOR SERVICE ACCRUED AFTER AUGUST 1, 1983.

In its opinion in Arizona Governing Committee v. Norris, 463 U.S. ____, 103 S.Ct. 3492 77 L. Ed. 1236 (1983), this Court addressed the issue of the relief to be awarded to remedy employer-sponsored pension plans' use of gender-based mortality tables. The Court, citing the financial and equitable considerations applicable to employer-sponsored pension plans in general, explicitly limited the remedy to benefits accrued after August 1, 1983.

The Second Circuit, on remand from this Court for reconsideration in light of Norris, failed to abide by this Court's ruling. The Second Circuit reinstated its earlier judgment requiring the equalization of retirement benefits for all service and for members who retired prior to August 1, 1983 because it concluded that there was no cost to

TIAA-CREF in awarding such relief. This ruling had the effect of diluting the clarity of this Court's decision in Norris and of opening in each case an inquiry as to the cost of retroactivity. Exposing employer-sponsored pension plans to such potential increased liability can only create uncertainty as to the means of achieving compliance with the Norris decision and raises the spectre of serious financial burdens.

The award of retroactive relief in a Title VII action lies in the discretion of the Court, to be exercised in accordance with the principles of equity. This Court has twice weighed the equities of retroactive relief in cases involving employer-sponsored pension plans' use of gender-based mortality tables. In both cases retroactive relief was denied. Los Angeles Department of Water and Power v. Manhart, 435 U.S. 702 (1978); Norris, supra.

In Norris, retroactive equalization of retirement benefits was rejected as "unprecedented

and manifestly unjust." 103 S. Ct. at 3509 (Powell, J.). Citing a U.S. Department of Labor study estimating the cost to all employer-sponsored pension plans of retroactive relief at $817 million to $1260 million annually for the next 15 to 30 years, the Court held:

> There is no justification for this Court ... to impose this magnitude of burden retroactively on the public. Accordingly, liability should be prospective only.

Id. at 3510 (Powell, J.)

The precise meaning of the Court's holding was spelled out by Justice Powell in a footnote, as follows:

> In this respect, I agree with Justice O'CONNOR that only benefits derived from contributions collected after the effective date of the judgment [August 1, 1983] need be calculated without regard to the sex of the employee. . . .

Id.

As the opinions of Justice Powell and Justice O'Connor indicate, the decision of this Court to

deny retroactive relief was based not on the impact of the remedy on the defendant before the Court in Norris, but on the "devastating" fiscal impact such a remedy would have on pension plans generally. Id. at 3510 (Powell, J.); Id. at 3512 (O'Connor, J.). The Court's emphasis on the U.S. Department of Labor study of costs nation-wide underscores the Court's intention that, henceforth, such retroactive relief was to be awarded in accordance with the uniform August 1, 1983 compliance date established by the Court, and not on case-by-case determination of the fiscal impact of any particular retroactive remedy on a defendant pension plan. The Court's adoption of a uniform compliance date for the equalization of retirement benefits reflected the Court's balancing of the diverse equitable interests of pension system members, employers, and the public.

The Second Circuit, in its decision below, erred in taking the case-by-case approach, rather than applying the uniform compliance date laid down in Norris. While recognizing that Norris

"appears to foreclose any possibility of the retroactive imposition of added financial burdens upon employers or plans", Appendix to Petition For Writ ("Appendix") at 9a, the Second Circuit reinstated its award of retroactive relief based on its finding that the expectations of the male annuitants in Spirt differed from those in Norris. The Second Circuit held that this was a permissible result under Norris because (Appendix at 8a):

> [i]f ... the Norris majority intended to bar retroactivity in all annuity cases simply because equalization of benefits must inevitably burden someone, we would have expected to see some intimation of that view in Justice Powell's opinion.

Amicus curiae The City of New York respectfully submits that the Court not only "intimated" that the equalization of benefits prior to August 1, 1983 was not required, it explicitly held as much. Norris, 103 S. Ct. at 3510.

The law respecting the validity of gender-based mortality tables in the calculations of

retirement benefits was established with certainty only with this Court's decision in Norris. Pension administrators, given the significant sums of money involved, their fiduciary duty to be prudent, the potential liability to male annuitants, and different signals from the Circuit Courts*, had cause for uncertainty prior to Norris. This Court's decision to set August 1, 1983 as a benchmark date from which henceforeward contributions to public pension plans must purchase retirement benefits calculated on the basis of gender-neutral mortality tables brought certainty to this area of law and settled the expectations of retirement benefit recipients past and present. Above all, it allowed pension plan administrators and municipal officials to anticipate the liabilities they would incur in eliminating gender-based mortality tables, enabling then to

* Compare, e.g., the Ninth Circuit's decision in Norris, 671 F.2d 330 (9th Cir. 1982), and the Sixth Circuit's decision in Peters v. Wayne State University, 691 F.2d 235 (6th Cir. 1982), vacated and remanded, 103 S. Ct. 3566, remanded, 718 F.2d 1100 (6th Cir. 1983).

proceed with confidence in bringing their retirement systems into compliance with this Court's decisions.

The Second Circuit's decision below to award retroactive relief has brought renewed uncertainty to the administration of pension plans and related litigation. This Court should grant the petition for writ of certiorari to correct the Second Circuit's misreading of Norris and to reiterate the principles articulated in Norris.

CONCLUSION

For the reasons set forth herein, amicus curiae The City of New York respectfully urges that the petition for writ of certiorari to review the decision of the Second Circuit Court of Appeals be granted.

September 7, 1984.

Respectfully submitted,

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No. 84-50

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

TEACHERS INSURANCE AND ANNUITY ASSOCIATION
and COLLEGE RETIREMENT EQUITIES FUND,
Petitioners,
-v.-
DIANA L. SPIRT, et al.,
Respondents.

BRIEF FOR AMICUS CURIAE THE STATE OF FLORIDA IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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INTEREST OF AMICUS CURIAE

The State of Florida submits this brief seeking reversal of the judgment of the Second Circuit, and in support of Part I of

the Petition For Writ of Certiorari. The state operates a unified pension system for all state employees and employees of approximately 1100 local governments.[1] Until August 1, 1983, options under the plan were based upon sex-distinct mortality tables.[2] The plan has been challenged in

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[1] Florida's Retirement System (hereafter FRS) is a defined benefit pension plan which provides, and historically has provided identical monthly benefits to all similarly situated male and female retirees under its first and primary single-life annuity option. Before August 1, 1983, the remaining three FRS elective joint annuitant options provided benefits based on sex-distinct mortality tables which resulted in lower monthly benefits for male retirees than similarly situated females.

[2] Following the Court's decision in Arizona Governing Comm. for Tax Deferred Annuity and Deferred Compensation Plans v. Norris, ___U.S.___, 77 L.Ed.2d 1236 (1983), the administrative rules and the mortality tables governing the payment of retirement benefits under the FRS were changed to provide identical monthly benefits to all similarly situated males and females

(Footnote continued on next page)

Long v. Florida, No. TCA 82-1056-WS (N.D. Fla.), and the district court is considering awarding retroactive relief against the FRS.[3] (A. 15-48). Depending

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retiring on or after August 1, 1983. The State of Florida accomplished the complete unisex conversion of its retirement system in just the three week period between the rendering of the Norris decision on July 6, 1983, and the effective date of the judgment, August 1, 1983. To accomplish this feat, emergency rules had to be promulgated until the permanent rules could take effect. See, §120.54, Fla. Stat. (1983). (A. 1-14).

[3] Long v. Florida is prinicipally a class action brought by males retired before August 1, 1983, or their joint annuitants, receiving benefits under one of the three joint annuitant elective options of the FRS. Their challenge to the FRS is based upon Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e, et seq. (1982). Because the FRS offers a defined benefit plan, an award of retroactive relief would have to come from either increased future contributions by plan members, or from the taxpayers of both state and local government units.

upon the form of retroactive relief, the parties are in agreement that the undiscounted stream of future payments to class members after January 1, 1985 would cost the state between $57,500,000.00 and $144,200,000.00. (A. 49-54).

It is our position that the Court has established that awards in pension actions involving challenges to the use of sex-distinct mortality tables before August 1, 1983 should be prospective only. Arizona Governing Comm. for Tax Deferred Annuity and Deferred Compensation Plans v. Norris, _____U.S._____, 77 L.Ed.2d 1236 (1983). The failure of lower courts to follow the Court's directive in Norris is resulting in the very "unanticipated financial burdens" to the public that motivated the Court's decision to bar retroactive relief. Id. at 1263 and 1265. The Court's guidance is requested to

lay to rest once and for all the question of whether retroactive relief should be awarded in pension actions involving challenges to the use of sex-distinct mortality tables before August 1, 1983.

ARGUMENT

IN NORRIS THE COURT DETERMINED THAT RETROACTIVE RELIEF IN PENSION ACTIONS INVOLVING CHALLENGES TO THE USE OF SEX-DISTINCT MORTALITY TABLES BEFORE AUGUST 1, 1983 WAS INEQUITABLE AND SHOULD NOT BE AWARDED.

On both occasions when called upon to consider retroactive relief in the context of Title VII and pension plans, the Court has declined to award the requested relief. Arizona Governing Comm. for Tax Deferred Annuity and Deferred Compensation Plans v. Norris, ____U.S.____, 77 L.Ed.2d 1236 (1983), and Los Angeles Department of Water & Power v. Manhart, 435 U.S. 702

(1978). The court's decisions in Norris and Manhart reflect its sensitivity to the unusually delicate balance of interests involved in Title VII challenges to pension plans. Recognizing the real danger in such instances of visiting upon the heads of innocent third persons the brunt of retroactive compliance with new developments in the law, this Court in both cases displayed its willingness to fashion equitable remedies designed to protect the interests of all involved.

Thus, in Manhart the Court recognized the "special dangers of retroactive Title VII awards in this field," and pointed out that "retroactive liability could be devastating for a pension fund." Manhart, 435 U.S. at 722-23. As the Court correctly observed, the real world result of the imposition of massive unfunded retroactive liability upon a pension fund is to

jeopardize the fund's continued solvency, and the future security of all its members. Obviously unwilling to endanger the retirement security of innocent retirees, the Court utilized the equitable powers available under Title VII to award prospective relief only.

When considering the question of retroactive relief in Norris, Justice Powell noted: "Manhart did put all employer-operated pension funds on notice that they could not 'require that men and women make unequal contributions to [the] fund . . . .'" 77 L.Ed.2d at 1262. Manhart, however, did not resolve all questions extant in the developing area of of Title VII's applicability to employer-sponsored and operated pension funds. Real and reasonable doubts remained as to the

precise scope of the Manhart holding. Such doubts were laid to rest by Norris.[4]

In Norris, for the first time, the Court decided that Title VII demands that all options under all employer-sponsored or operated pension plans must be calculated on a sex-neutral basis. The majority of the Court also concluded that Manhart had not sufficiently foreshadowed such a result and that retroactivity back to the date of the Manhart decision was not compelled. 77 L.Ed.2d at 1265.

In recognition of the broad scope of its decision in Norris, a majority of the Court concurred in a comparably broad-based equitable rule of relief designed to resolve all remaining disputes over

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[4] See, Hager & Zimpleman, The Norris Decision, Its Implications & Application, 32 Drake L. Rev. 913, 923-29 (1983).

retroactive relief in all employer-sponsored or operated pension plans: All post-August 1, 1983 contributions must be used to fund sex-neutral benefits; pre-August 1, 1983 contributions could continue to fund sex-distinct benefits. In fashioning this relief, the Court took the highly unusual action of delaying the effective date of its judgment. This, more than any other single fact, evidences the Court's intent to establish a uniform rule regarding Title VII and employer sponsored and operated pension plans, and to provide a reasonable time for employers to comply with the Court's mandate.

As mentioned earlier, in foreclosing retroactive relief in Norris, the Court recognized that such an exercise of its equitable discretion under Title VII was necessary to prevent the economic disruption of many pension plans under the weight

of massive unforeseen and unfunded liability. Understandably, the Court was unwilling to make the cost of retroactive compliance operate to the detriment of the future security of a multitude of innocent persons.[5] As the Court stated: "There is no justification for this court, particularly in view of the question left open in Manhart, to impose this magnitude of burden retroactively on the public." 77 L.Ed.2d at 1263.

Unfortunately, the lower courts are misapprehending the Court's decisions in Norris and Manhart. The court of appeals in Spirt, and the district court in Long have read those decisions in their

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[5] This is the central theme of Firefighters Local Union No. 1784 v. Stotts, ___U.S.___, 104 S.Ct. 2576 (1984), and, in a more general sense, a basic theme of American jurisprudence.

narrowest possible sense and have overlooked the broad policies enunciated by the Court.

In Spirt, the court of appeals grounded its exception to Norris on the fact that certain benefit levels for male annuitants were unspecified. 34 F.E.P. Cases 1510, 1513. The court reasoned that an award of retroactive relief was not precluded by the Court's holding in Norris, because the relief could come from the unsuspecting males without imposing a burden upon the employer or the plan.[6]

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[6] It is interesting that in the face of the Court's admonition to seek out equitable results in fashioning relief affecting innocent third persons, the court of appeals saw no inequity in ordering a reduction in the male annuitants' benefits simply because the men were without knowledge of the precise amount of their benefits, while the court would not order

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In Long, the State of Florida asserted that Manhart did not put employer-operated pension funds on notice that purely voluntary options in a defined benefit plan[7] funded with equal contributions and

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such a reduction if the men had been provided this information. While there may be a certain wit in saying what you don't know won't hurt you, it lacks something as a legal precept. To rely upon such a false distinction not only costs the legal system in integrity, but the men do suffer the loss of identifiable benefits. Since, "[a]s a class, women live longer than men," Manhart, 435 U.S. at 704, with the decision in Spirt, men will not only die earlier than women and receive less return on their pension investment, they must suffer the additional insult of a further reduction in their pension benefits "since they do not know what they are losing anyway." Such a result hardly comports with the equitable reasoning that formed the framework for Manhart and Norris.

[7] For a discussion of the distinctions between defined benefit plans and defined

(Footnote continued on next page)

unisex in its primary benefit violated Title VII. Despite the fact that Norris was the first case to definitively resolve the issues unanswered in Manhart, and despite Florida's immediate compliance with Norris's objectives, the district court distinguished Norris on the ground that Florida's pension system was employer-operated. (A. 30-33).

(Footnote continued from previous page)

contribution plans, see, U.S. Department of Labor Cost Study of the Impact of an Equal Benefits Rule on Pension Benefits, at 7-10, and 11-12 (January, 1983). Ironically, because roughly 65 percent of all persons in non-federal government pension plans are in defined benefit plans, such as Florida's, which, under joint annuitant options, characteristically have provided male retirees with smaller monthly benefits than similarly situated females, a disproportionate burden for retroactive compliance may fall on innocent female pension members absent clarification of the Court's holding in Norris. See also, Bernstein, The Havoc In Retirement Benefits After Norris, 70 A.B.A. J.80 (February, 1984).

In Norris, the Court designated August 1, 1983 as the date for employer pension plans to be in compliance with Title VII. The line painted by the Court marking August 1, 1983 is being blurred by inconsistent lower court interpretations of the Court's decision. The continued viability of employer sponsored or operated pension plans requires that this and all other courts speak with one voice on the matter. A proliferation of exceptions to the Norris rule of non-retroactivity only serves to handicap employers and insurers in their attempt to comply with Title VII as interpreted in Manhart and Norris. The State of Florida would ask that the Court repaint the line drawn in Norris in a color all can see.

CONCLUSION

Contrary to policies enunciated in Norris, a patch-work approach to retroactive relief in pension suits is developing. All we are requesting is that the Court require a consistent application of Norris. Accordingly, the State of Florida respectfully requests that the Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit be granted.

Respectfully submitted,

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A P P E N D I X

120.54 Rulemaking; adoption procedures.-

(1) Prior to the adoption, amendment, or repeal of any rule not described in subsection (9), an agency shall give notice of its intended action, setting forth a short and plain explanation of the purpose and effect of the proposed rule, the specific legal authority under which its adoption is authorized, and a summary of the estimate of the economic impact of the proposed rule on all persons affected by it.

(a) Except as otherwise provided in this paragraph, the notice shall be mailed to the committee, to all persons named in the proposed rule, and to all persons who have made requests of the agency for advance notice of its proceedings at least 14 days prior to such mailing. The agency shall also give such notice as is prescribed by rule to those particular classes of persons to whom the intended action is directed. Notice of intent by an educational unit to adopt, amend, or repeal any rule not described in subsection (9) shall be made:

1. By publication in a newspaper of general circulation in the affected area;

2. By mail to all persons who have made requests of the educational unit for advance notice of its proceedings and to organizations representing persons affected by the proposed rule; and

3. By posting in appropriate places so that those particular classes of persons to whom the intended action is directed may be duly notified.

Such publication, mailing, and posting of notice shall occur at least 14 days prior to the intended action.

(b) The notice shall be published in the Florida Administrative Weekly not less than 21 days prior to the intended action, except that notice of actions proposed by educational units or units of government with jurisdiction in only one county or a part thereof need not be published in the Florida Administrative Weekly or transmitted to the committee. The proposed rule shall be available for inspection and copying by the public at the time of the publication of notice.

(2)(a) Each agency, prior to the adoption, amendment, or repeal of any rule, shall provide information on its proposed action by preparing a detailed economic impact statement. The economic impact statement shall include:

1. An estimate of the cost to the agency of the implementation of the proposed action, including the estimated amount of paperwork;

2. An estimate of the cost or the economic benefit to all persons directly affected by the proposed action;

3. An estimate of the impact of the proposed action on competition and the open market for employment, if applicable; and

4. A detailed statement of the data and method used in making each of the above estimates.

(b) If an economic impact statement is required before an agency takes action on an application or petition by any person,

the statement shall be prepared within a reasonable time after the application is made or the petition is filed.

(c) The failure to provide an adequate statement of economic impact is a ground for holding the rule invalid; however, beginning October 1, 1978, no rule shall be declared invalid for want of an adequate statement of economic impact unless the issue is raised in an administrative or judicial proceeding within 1 year of the effective date of the rule to which the statement applies.

(3) If the intended action concerns any rule other than one relating exclusively to organization, procedure, or practice, the agency shall, on the request of any affected person received within 14 days after the date of publication of the notice, give affected persons an opportunity to present evidence and argument on all issues under consideration appropriate to inform it of their contentions. Prisoners, as defined in s. 944.02(5), may be limited by the Department of Corrections to an opportunity to submit written statements concerning intended action on any department rule. The agency may schedule a public hearing on the rule and, if requested by any affected person, shall schedule a public hearing on the rule. Any material pertinent to the issues under consideration submitted to the agency within 14 days after the date of publication of the notice or submitted at a public hearing shall be considered by the

agency and made a part of the record of the rulemaking proceeding.

(4)(a) Any substantially affected person may seek an administrative determination of the invalidity of any proposed rule on the ground that the proposed rule is an invalid exercise of delegated legislative authority.

(b) The request seeking a determination under this subsection shall be in writing and must be filed with the division within 14 days after the date of publication of the notice. It must state with particularity facts sufficient to show that the person challenging the proposed rule would be substantially affected by it and facts sufficient to show the invalidity of the proposed rule.

(c) Immediately upon receipt of the petition, the division shall forward copies of the petition to the agency whose rule is challenged, the Department of State, and the committee. Within 10 days after receiving the petition, the division director, if he determines that the petition complies with the above requirements, shall assign a hearing officer who shall conduct a hearing within 30 days thereafter, unless the petition is withdrawn. Within 30 days after conclusion of the hearing, the hearing officer shall render his decision and state the reasons therefor in writing. The division shall forthwith transmit copies of the hearing officer's decision to the Department of State and to the committee. The hearing officer may declare the proposed rule wholly or partly

invalid. The proposed rule or provision of a proposed rule declared invalid shall be withdrawn from the committee by the adopting agency and shall not be adopted. No rule shall be filed for adoption until 21 days after the notice required by subsection (1) or until the hearing officer has rendered his decision, as the case may be. However, the agency may proceed with all other steps in the rulemaking process. In the event part of a proposed rule is declared invalid, the adopting agency may, in its sole discretion, withdraw the proposed rule in its entirety. The agency whose proposed rule has been declared invalid in whole or part shall give notice of the decision in the first available issue of the Florida Administrative Weekly.

(d) Hearings held under this provision shall be conducted in the same manner as provided in s. 120.57 except that the hearing officer's order shall be final agency action. The agency proposing the rule and the person requesting the hearing shall be adversary parties. Other substantially affected persons may join the proceeding as parties or intervenors on appropriate terms which will not substantially delay the proceedings. Failure to proceed under this subsection shall not constitute failure to exhaust administrative remedies.

(5) Any person regulated by an agency or having a substantial interest in an agency rule may petition an agency to adopt, amend, or repeal a rule or to provide the

minimum public information required by s. 120.53. The petition shall specify the proposed rule and action requested. Not later than 30 calendar days after the date of filing a petition, the agency shall initiate rulemaking proceedings under this act, otherwise comply with the requested action, or deny the petition with a written statement of its reasons for the denial.

(6) In rulemaking proceedings, the agency may recognize any material which may be judicially noticed, and it may provide that materials so recognized shall be incorporated into the record of the proceeding. Before the record of any proceeding is completed, all parties shall be provided a list of such materials and given a reasonable opportunity to examine them and offer written comments thereon or written rebuttal thereto.

(7) Each rule adopted shall be accompanied by a reference to the specific rulemaking authority pursuant to which the rule was adopted and a reference to the section or subsection of the Florida Statutes or the Laws of Florida being implemented, interpreted, or made specific.

(8) Each rule adopted shall contain only one subject and shall be preceded by a concise statement of the purpose of the rule and reference to the rules repealed or amended, which statement need not be printed in the Florida Administrative Code. Pursuant to rule of the Department of State, a rule may incorporate material by reference but only as such material exists on the date the rule is adopted.

For purposes of such rule, changes in such material shall have no effect with respect to the rule unless the rule is amended to incorporate such material as changed. No rule shall be amended by reference only. Amendments shall set out the amended rule in full in the same manner as required by the constitution for laws.

(9)(a) If an agency finds that an immediate danger to the public health, safety, or welfare requires emergency action, the agency may adopt any rule necessitated by the immediate danger by any procedure which is fair under the circumstances and necessary to protect the public interest, provided that:

1. The procedure provides at least the procedural protection given by other statutes, the Florida Constitution, or the United States Constitution.

2. The agency takes only that action necessary to protect the public interest under the emergency procedure.

3. The agency publishes in writing at the time of, or prior to, its action the specific facts and reasons for finding an immediate danger to the public health, safety, or welfare and its reasons for concluding that the procedure used is fair under the circumstances. In any event, notice of emergency rules, other than those of educational units or units of government with jurisdiction in only one county or a part thereof, shall be published in the first available issue of the Florida Administrative Weekly. The agency's findings of immediate danger, necessity,

and procedural fairness shall be judicially reviewable.

(b) Rules pertaining to the public health, safety, or welfare shall include, but not be limited to, those rules pertaining to perishable agricultural commodities.

(c) An emergency rule adopted under this subsection may not be effective for a period longer than 90 days and shall not be renewable. However, the agency may take identical action by normal rulemaking procedures.

(d) Subject to applicable constitutional and statutory provisions, an emergency rule becomes effective immediately on filing, or at a date less than 20 days thereafter if specified in the rule, if the adopting agency finds that such effective date is necessary because of immediate danger to the public health, safety, or welfare.

(10) The Administration Commission shall promulgate one or more sets of model rules of procedure which shall be reviewed by the committee and filed with the Department of State. On filing with the department, the appropriate model rules shall be the rules of procedure for each agency subject to this act to the extent that each agency does not adopt a specific rule of procedure covering the subject matter contained in the model rules applicable to that agency. An agency may seek modification of the model rules of procedure to the extent necessary to conform to any requirement imposed as a condition precedent to receipt of federal funds or permit persons in this state to receive tax benefits under federal

law or as required for the most efficient operation of the agency as determined by the Administration Commission. The reasons for the modification shall be published in the Florida Administrative Weekly. Agency rules adopted to comply with ss. 120.53 and 120.565 must be in substantial compliance with the model rules.

(11)(a) The adopting agency shall file with the committee, at least 21 days prior to the proposed adoption date, a copy of each rule it proposes to adopt; a detailed written statement of the facts and circumstances justifying the proposed rule; a copy of the estimate of economic impact required by subsection (2); a statement of the extent to which the proposed rule establishes standards more restrictive than federal standards or a statement that the proposed rule is no more restrictive than federal standards or that a federal rule on the same subject does not exist; and the notice required by subsection (1). After the final public hearing on the proposed rule, or after the time for requesting a hearing has expired, the adopting agency shall file any changes in the proposed rule and the reasons therefor with the committee or advise the committee that there are no changes. In addition, when any change is made in a proposed rule, other than a technical change, the adopting agency shall provide a detailed statement of such change by certified mail or actual delivery to any person who requests it in writing at the public hearing. The agency shall file the change with the committee, and provide the

statement of change to persons requesting it, at least 7 days prior to filing the rule for adoption. Educational units, other than units of the State University System and the Florida School for the Deaf and the Blind, and local units of government with jurisdiction in only one county or part thereof shall not be required to make filings with the committee. This paragraph does not apply to emergency rules adopted pursuant to subsection (9). However, agencies, other than those listed herein, adopting emergency rules shall file a copy of each emergency rule with the committee.

(b) If the adopting agency is required to publish its rules in the Florida Administrative Code, it shall file with the Department of State three certified copies of the rule it proposes to adopt, a summary of the rule, a summary of any hearings held on the rule, and a detailed written statement of the facts and circumstances justifying the rule. Agencies not required to publish their rules in the Florida Administrative Code shall file one certified copy of the proposed rule, and the other material required above, in the office of the agency head; and such rules shall be open to the public pursuant to s. 120.53(2). Filings shall be made no less than 21 days nor more than 90 days after the notice required by subsection (1). If a public hearing is held, the 90-day limit is extended to 21 days after adjournment of the final hearing on the rule, 21 days after receipt of all material

authorized to be submitted at the hearing, or 21 days after receipt of the transcript, if one is made, whichever is latest. At the time a rule is filed, the agency shall certify that the time limitations prescribed by this subsection have been complied with and that there is no administrative determination pending on the rule. The department shall reject any rule not filed within the prescribed time limits or upon which an administrative determination is pending. If a rule has not been adopted within the time limits imposed by this section, the agency proposing the rule shall withdraw the rule and give notice of its action in the same manner as is prescribed in paragraphs (1)(a) and (b).

(12)(a) The proposed rule shall be adopted on being filed with the Department of State and become effective 20 days after being filed, on a later date specified in the rule, or on a date required by statute. Rules not required to be filed with the Department of State shall become effective when adopted by the agency head or on a later date specified by rule or statute.

(b) After the notice required in subsection (1) and prior to adoption, the agency may withdraw the rule in whole or in part or may make such changes in the rule as are supported by the record of public hearings held on the rule, technical changes which do not affect the substance of the rule, changes in response to written material relating to the rule received by

the agency within 14 days after the notice and made a part of the record of the proceeding, or changes in response to a proposed objection by the committee. After adoption and before the effective date, a rule may be modified or withdrawn only in response to an objection by the committee or may be modified to extend the effective date by not more than 60 days when the committee has notified the agency that an objection to the rule is being considered. The agency shall give notice of its decision to withdraw or modify a rule in the first available issue of the publication in which the original notice of rulemaking was published and shall notify the Department of State if the rule is required to be filed with the Department of State. After a rule has become effective, it may be repealed or amended only through regular rulemaking procedures.

(13) If the committee disapproves a proposed rule and the agency does not modify the rule, the committee shall file with the Department of State a notice of the disapproval detailing with particularity its objection to the rule. The Department of State shall publish this notice in the Florida Administrative Weekly and shall publish, as a history note to the rule when it is published in the Florida Administrative Weekly and shall publish, a reference to the committee's disapproval and to the issue of the Weekly in which the full text thereof appears.

(14) No agency has inherent rulemaking authority; nor has any agency authority to

establish penalties for violation of a rule unless the Legislature, when establishing a penalty, specifically provides that the penalty applies to rules. However, an agency may adopt rules necessary to the proper implementation of a statute prior to the effective date of the statute, but the rules may not be enforced until the statute upon which they are based is effective.

(15) The rulemaking provision of this chapter do not apply to compensation appeals referees.

(16) Rulemaking proceedings shall be governed solely by the provisions of this section unless a person timely asserts that his substantial interests will be affected in the proceeding and affirmatively demonstrates to the agency that the proceeding does not provide adequate opportunity to protect those interests. If the agency determines that the rulemaking proceeding is not adequate to protect his interests, it shall suspend the rulemaking proceeding and convene a separate proceeding under the provisions of s. 120.57. Similarly situated persons may be requested to join and participate in the separate proceeding. Upon conclusion of the separate proceeding, the rulemaking proceeding shall be resumed.

History.-s. 1, Ch. 74-310; s. 3, ch. 75-191; s. 3, ch. 76-131; s.s. 1, 2, ch. 76-276; s. 1, ch. 77-174; s. 13, ch. 77-290; s. 3, ch. 77-453; s. 2, ch. 78-28; s. 2, ch. 78-425; s. 7, ch. 79-3; s. 3, ch. 79-299; s. 69, ch. 79-400; s. 5, ch. 80-391; s. 1 ch. 81-309; s. 2, ch. 83-351.
cf.-s. 161.161 Beach erosion control hearings, additional notice requirement.
2. 403.8055 Department adoption of federal standards.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

HUGHLAN LONG
and S. DEWEY HAAS,
individually and on
behalf of all retired
and present employees
subject to the Florida
Retirement System
established by Chapter
121, Florida Statutes,
and all joint annuitants
thereunder,

Plaintiffs,

v.

THE STATE OF FLORIDA,
a governmental body,
THE HONORABLE ROBERT
GRAHAM, as Governor of
the State of Florida,

Defendants.

TCA 82-1056-WS

ORDER

This cause was heard by the court on February 8, 1984, on plaintiffs' and defendants' cross-motions for summary judgment. Argument was also heard on several other pending motions. The court

having considered the record and having heard the argument of counsel and being otherwise fully advised in the premises, it is ORDERED AND ADJUDGED;

1. Defendants' motion to abstain and dismiss or stay is DENIED as moot.

2. Defendants' motion to dismiss as to plaintiff Long is GRANTED for all claims except the Title VII claim. Res judicata bars all claims which were or could have been raised in the previous suit. Allen v. McCurry, 449 U.S. 90, 94 (1980). Under 28 U.S.C. § 1738, federal courts are required to give the same preclusive effect to a state judgment as the judgment would be given in that state. Federal courts therefore must look to state law in determining preclusive effect. The Florida Supreme Court ruled in Gordon v. Gordon, 59 So. 2d 40, 44 (Fla.), cert. denied, 344 U.S. 478 (1952), that res judicata "bars a

subsequent suit between the parties based on the same cause of action and is conclusive as to all matters germane thereto that were or could have been raised . . . ."

Plaintiff Long in this case raised his Title VII claim in an administrative appeal to the Florida First District Court of Appeal. That court ruled that it had no jurisdiction to hear the Title VII claim. Long v. Dept. of Administration, Division of Retiremnt, 428 So. 2d 688 (Fla. 1st DCA 1983). Until that ruling, the law was not settled as to whether a Title VII action could be brought in that court. Plaintiff was therefore precluded from fully litigating his Title VII claims and cannot be said to have had a "full and fair opportunity" to present his case.

Defendants argue that state law provides a remedy similar to that of Title

VII and that, since plaintiff Long could have raised the state law claim and did not, his Title VII claim should be barred as well. Under Kremer v. Chemical Construction Corp., 456 U.S. 461 (1980), it is clear that a plaintiff whose cause has been fully litigated under a state law "at least as broad" as Title VII will be collaterally estopped from relitigating the issue of employment discrimination under Title VII.

However, where a plaintiff has not raised a similar state statute and the claim has not been fully litigated, it cannot be said that his Title VII claim is collaterally estopped. Moreover, the plaintiff cannot be barred by res judicata from bringing a cause of action which could not have been raised in the previous suit. The fact that another claim could have been raised is not germane.

In the case at bar, the state court had not yet ruled as to its jurisdiction over Title VII claims. Plaintiff Long duly raised this claim but did not obtain a judgment on the merits. Under these circumstances, plaintiff cannot be barred from raising this claim in federal court.

3. Mr. Carl A. Rassler's motion to intervene as plaintiff is GRANTED.

4. Plaintiff's motion for rehearing on decertification of class "B" is DENIED. This court is under a mandate to protect the interests of the nonappearing class members and to continually reassess the appropriateness of the class certification. Coopers & Lybrand v. Livesay, 437 U.S. 463, 470 n. 11 (1978); Grigsby v. North Mississippi Medical Center, Inc., 586 F.2d 457, 462 (5th Cir. 1978). The class as originally stipulated to by the parties and certified by the

court included all male persons retired and receiving benefits under options 2, 3, or 4 of Florida Retirement System, all male persons currently employed who are entitled to vested pension or retirement plan benefits, and all persons, male or female, holding rights as joint annuitants under the Florida Retirement System.

Because the Florida Retirement System (FRS) was changed as of August 1, 1983, to conform to the nondiscrimination requirements of Title VII, the court deems it necessary to distinguish the claims of those class members retiring on or after that date. Under Federal Rule of Civil Procedure 23(c)(1), "[t]he district court has a continuing power" to alter or amend its certification order before decision on the merits. Elster v. Alexander, 608 F.2d 196, 197 (5th Cir. 1979). Rule 23(c)(4) gives the court power to divide the class

into subclasses. The court hereby modifies its certification ruling to certify class members retiring on or after August 1, 1983, as a subclass in the present action under Federal Rule of Civil Procedure 23(b)(2). The court hereby decertifies those same class members under Federal Rules of Civil Procedure 23(b)(1) and (b)(3).

Class members who retired before August 1, 1983, remain certified under Federal Rules of Civil Procedure 23(b)(1), (b)(2), and (b)(3).

5. Plaintiffs' motion for discovery sanctions is DENIED at this time. The court reserves the right to modify this ruling at a later time if it deems it necessary.

6. Plaintiffs' pendent state law claims are DISMISSED under Pennhurst State

School and Hospital v. Halderman, 52 U.S.L.W. 4155 (1984).

7. Plaintiffs' claims under 42 U.S.C. § 1983 are DISMISSED. Under the U.S. Supreme Court's rationale in Great American Federal Savings & Loan Ass'n v. Novotny, 442 U.S. 366 (1979), to allow the plaintiffs to maintain an action under § 1983 on substantive rights created by Title VII would defeat the "comprehensive plan" designed by Congress in enacting Title VII by allowing plaintiffs to "completely bypass the administrative process, which plays such a crucial role in the scheme established by Congress." 442 U.S. at 376.

Plaintiffs also base their § 1983 claim on the equal protection clause of the fourteenth amendment. In Shinholster v. Graham, 527 F. Supp. 1318 (N.D. Fla. 1981), this court held that claims for money damages under § 1983 against the state and

state officials in their official capacities are barred by the eleventh amendment. Under the test laid down in Harlow v. Fitzgerald, 457 U.S. 800 (1982), defendants have qualified immunity in their individual capacities unless their actions violated "clearly established statutory or constitutional rights." Because, in Long v. Department of Administration, Division of Retirement, 428 So. 2d 688 (Fla. 1st DCA 1983), the state court held that FRS was not violative of the fourteenth amendment, the defendants could not have violated clearly established law.

Of the remedies available under § 1983, only prospective injunctive relief remains. However, according to plaintiffs' brief, their prayer for future relief is considered "retroactive" because it will require retroactive funding of the FRS contribution base. Prospective injunctive

relief is therefore inappropriate, and plaintiffs' claims under § 1983 are dismissed as unredressable.

8. Defendants' motion for dismissal for lack of Article III subject matter jurisdiction is DENIED.

9. Defendants' motion to dismiss as to plaintiff Haas is DENIED.

10. Also before the court for consideration is the motion of Vertie V. Prater to withdraw her request for exclusion from the class. Mrs. Prater states that she did not understand her rights when she asked to be excluded, and, now that she does understand, she would like to be allowed to participate. Defendants oppose the motion on the grounds that Mrs. Prater's reasons for wishing to withdraw her request are not exceptional and could easily apply to all other potential class members who have opted

out. Defendants contend that a precedent would be set which would allow a number of potential class members to opt back in. They therefore do not consent to her reinstatement and claim they would be prejudiced thereby. The only case cited to the court on this issue allowed the class member to reenter the class. In that case, the member's reentry was stipulated to be the parties, and the court determined there would be no prejudice to either side. Under the law pertaining to Rule 23(b)(3) class actions, Mrs. Prater had thirty days in which to determine her rights before opting out. Because defendants oppose this motion and claim prejudice to their case, the motion by Mrs. Prater to withdraw her request for exclusion is DENIED.

11. Plaintiffs' motion for summary judgment under Title VII is GRANTED as to

liability. The court hereby awards declaratory relief only.

12. The determination of whether this court has the discretion to award damages in this case rests on the question of the preclusive effect of the Supreme Court's "prosepctive-only" decision in Arizona Governing Committee v. Norris, ___U.S.___, 103 S. Ct. 3492, 77 L. Ed. 2d 1236 (1983). Retroactive damages were denied in Norris for two main reasons, one given in Justice Powell's opinion and one in Justice O'Connor's opinion. Writing for the majority on damages (with Justice O'Connor concurring separately), Justice Powell emphasized that the question of whether Title VII would be applied to an employer providing a retirement benefit program through private insurance companies had not been decided by the Court. City of Los Angeles, Dept. of Water & Power v. Manhart,

435 U.S. 702 (1978), had expressly said: "Nothing in our holding implies that it would be unlawful for an employer to set aside equal retirement contributions for each employee and let each retiree purchase the largest benefits which his or her accumulated contributions could command in the open market." Norris, 77 L. Ed. 2d at 1250, quoting Manhart, 435 U.S. at 717-718. Thus, Justice Powell concluded that, because of this open market exception, employers had no previous notice that third-party insurer programs could be illegal. He therefore denied retroactive damages, stating that "[a]n employer reasonably could have assumed that it would be lawful to make available to its employees annuities offered by insurance companies on the open market." 77 L. Ed. 2d at 1263.

Justice O'Connor, however, did not agree that the Court's holding concerning third-party insurers was unforeshadowed. She found that "[d]espite Justice Powell's argument, the result in Manhart is not distinguishable from the present situation." 77 L. Ed. 2d at 1264. She, on the other hand, was concerned that retroactive damages would "jeopardize the entire pension fund," and therefore made the award prospective only. Moreover, she was convinced that a retroactive holding was not necessary to force pension plan administrators "who may have thought until our decision today that Title VII did not extend to plans involving third-party insurers," to conform to the Court's decision. 77 L. Ed. 2d at 1265.

The issue of "open market" annuities, on which the Norris denial of retroactive damages centered, is not applicable to the

case at bar. The Florida Retirement System is employer-operated and mandatory for its employees. Thus, although the precise issue of unequal benefits was decided in Norris, the court finds that the denial of retroactive damages in Norris is not preclusive in this case.

In Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975), the Supreme Court established a strong presumption in favor of back pay for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination." 422 U.S. at 421. The court went on to say that good faith is not a defense to a Title VII violation, and a showing of bad faith is not required. Id. at 422-23.

Although recognizing the presumption that retroactive damages are appropriate in Title VII cases once liability is established, both Norris and Manhart advised caution in the award of damages. "The Albermarle presumption in favor of retroactive liability can seldom be overcome, but it does not make meaningless the district court's duty to determine that such relief is appropriate." Manhart, 435 U.S. at 719. In denying retroactive damages, the Court in Manhart gave three grounds for the action: (1) because it was a "marked departure from past practice, . . . conscientious and intelligent administrators . . . may well have assumed that a program like the Department's was entirely lawful"; (2) "[t]here is no reason to believe that the threat of a back pay award is needed to cause other administrators to amend their practices to

conform to this decision"; and (3) "[r]etroactive liability could be devastating for a pension fund. The harm would fall in large part on innocent third parties." Id. at 720-23. On these three grounds, the court denied retroactivity "[w]ithout qualifying the force of the Albemarle presumption in favor of retroactive relief. . . ." Id.

Justice O'Connor, in her Norris concurrence, gave a similar analysis, using the guidelines set forth in Chevron Oil Co. v. Huson, 404 U.S. 97 (1971). Chevron gave three criteria: (1) whether the decision establishes "a new principle of law, either by overruling clear precedent or by deciding an issue of first impression whose resolution was not clearly foreshadowed"; (2) "whether retroactivity will further or retard the operation of the state"; (3) "whether retroactive application would

impose inequitable results." These criteria are substantially similar to the criteria used in Manhart. The mandate of the Supreme Court requires these criteria to be applied in determining the appropriate remedy in this case.

The precedent in this circuit for back pay awards was clearly established in James v. Stockham Valves & Fittings Company, 559 F.2d 310, 357 (5th Cir. 1977), and Pettway v. American Cast Iron Pipe Company, 494 F.2d 211, 252-53 (5th Cir. 1975), modified on other grounds, 576 F.2d 1157 (5th Cir. 1978). Bonner v. Prichard, 661 F.2d 1206 (11th Cir. 1981). The current Fifth Circuit has recently reaffirmed these earlier rulings in Carpenter v. Stephen F. Austin State University, 706 F.2d 608 (1983). Citing James, Pettway, and Albemarle, the Fifth Circuit wrote:

> The statutory mandate of Title VII does not automatically require the court to exercise its equitable powers and award back pay in all circumstances; nevertheless, as the district court correctly observed, the remedial purposes of Title VII command back pay relief in all but "special circumstances." The court's discretion to deny back pay, once the class has been shown to have sustained economic loss, is "narrow."

Id. at 631.

Defendants contend that the Norris decision and not Manhart constituted the first notice that the Florida Retirement System benefit plan violated Title VII prohibitions. The Manhart decision held that an employer-operated pension fund that required women to make larger contributions than men to obtain equal benefits violated Title VII. The Court recognized that the pension system was founded on actuarily sound life expectancy tables. It, however, determined that sex could not be the

discriminating factor in determining life expectancy. The Court found that Title VII focused on the individual and not the class, and that classifications in the employment context on the basis of sex, no matter how sound, were illegal.

> The statute makes it unlawful "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 USC § 2000e-2(a)(1) [42 USCS §2000e-2(a)(1)] (emphasis added). The state's focus on the individual is unambiguous. It precludes treatment of individuals as simply components of a racial, religious, sexual, or national class.

435 U.S. at 708.

> An employment practice that requires 2,000 individuals to contribute more money into a fund than 10,000 other employees simply because each of them is a woman, rather than a man, is in direct conflict with both the language and the policy of the Act. Such a practice does not pass the simple test of whether the evidence shows "treatment of a person in a manner

> which but for that person's sex would be different."

435 U.S. at 711.

The Florida Retirement System calls for equal contributions but distinguishes between men and women in benefit levels under three of four options. Norris involved a similar situation. Defendants therefore claim that Norris and not Manhart decided the principle of law that applies to this case. In deciding Norris, however, the majority of the Supreme Court relied almost exclusively on the Court's decision in Manhart. Justice Marshall quotes extensively from the Manhart language, as does Justice O'Connor in her concurrence:

> The court in Manhart found Title VII's focus on the individual to be dispositive of the present question. Congress in enacting Title VII intended to prohibit an employer from singling out an employee by race or sex for the purpose of imposing a greater burden or denying an equal benefit because of a characteristic

> statistically identifiable with the group but empirically false in many individual cases. See Manhart, 435 U.S., at 708-710, 55 L. Ed. 2d 657, 98 S. Ct. 1370.

77 L. Ed. 2d at 1264. The dissent in Norris does not challenge the majority finding on this issue. Rather, the dissent disagrees with the third-party insurer liability finding.

Like the Court in Norris and every other court but one that decided the issue, I see no meaningful distinction between discrimination at the pay-in stage as in Manhart and in the pay-out stage as in the case at bar. In either case, there is discrimination in compensation for equal work on the basis of sex, as prohibited by Title VII. As Manhart said, "[O]ne cannot say that an actuarial distinction based entirely on sex is 'based on any other factor than sex.' Sex is exactly what it is based on." 435 U.S. at 712-13 quoting

553 F.2d 581, 588 (9th Cir. 1976). Manhart condemned the use of sex-based actuarial tables. Even though the particular facts of that case dealt with the pay-in stage only, the state could not have reasonably assumed, in light of the Court's rationale and explicit language, that it could nevertheless continue to use sex-based tables at the pay-out stage.

As early as 1972, the Equal Employment Opportunity Commission promulgated federal regulations under "Guidelines on Discrimination Because of Sex," stating: "It shall be an unlawful employment practice for an employer to have a pension or retirement plan which . . . differentiates in benefits on the basis of sex." 29 C.F.R. § 1604.9(f)(1980). Suits were filed concerning this issue as early as 1974. (See Spirt v. Teachers Insurance & Annuity Association, 691 F.2d 1054, 1067 (2nd Cir.

1982).) The Supreme Court's decision in Manhart came down in 1978. After Manhart, as Justice Marshall notes in Norris, every lower court but one found liability on this issue. Thus, neither the Supreme Court's decision on this issue in Norris nor this order today establishes a new principle of law or a marked, unforeshadowed overruling of precedent. Under the first criterion, then, retroactive damages would not be prohibited.

Regarding the second criterion, Justice O'Connor explained: "Manhart held that a central purpose of Title VII is to prevent employers from treating individual workers on the basis of sexual or racial group characteristics." Norris, 77 L. Ed. 2d at 1265. It is difficult to see how awarding retroactive damages in this case would "retard the operation" or "frustrate the purpose" of the statute.

The third criterion requires the court to consider the impact of retroactive damages on the pension fund. Although the necessity of using public funds to provide damages is not sufficient reason to deny back pay awards, Carpenter, 706 F.2d at 632, Norris and Manhart both compel this court to consider whether the award would devastate the pension fund and harm "innocent third parties." The information before the court at this time is not sufficient for a decision on this point, and the parties are therefore requested to prepare appropriate memoranda. Defendants, according to their letter of February 14, 1984, were to provide the court with the results of their research by March 10. Defendants are directed to do so by March 23. Plaintiffs shall have ten days thereafter to respond.

DONE AND ORDERED this _____ day of March, 1984.

_____
WILLIAM STAFFORD
CHIEF JUDGE

IN THE UNITED STATE DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

HUGHLAN LONG, et al.,

Plaintiffs,

v.

STATE OF FLORIDA, et al.,
Defendants.

TCA 82-1056

ORDER

Before the court for consideration is defendants' motion for reconsideration of the liability finding in the court's order of March 16, 1984. Defendants contend that (1) intent to discriminate was not established and (2) the fourteenth amendment, the consitutional source for Title VII as applied to governmental employers, requires the establishment of discriminatory motive or animus.

Defendants seek to argue that "plaintiffs to prevail under Title VII must

first prove defendants' intent to discriminate, must first prove defendants' discriminatory motive or animus even to establish actionable liability." (Document 2717, p. 13) Defendants also endeavor to distinguish the intent issue from the "bad faith" issue previously found irrelevant by this court under the rule of Albemarle Paper Co. v. Moody, 422 U.S. 405, 422-23 (1975). Defendants cite numerous cases supporting the proposition that intent is a requisite element in a discrimination case brought under the fourteenth amendment. The court is well aware of that requirement. It is irrelevant in this case, however, as the plaintiffs' fourteenth amendment claim has already been dismissed by the court's previous order.

Defendants cite no cases holding intent as a necessary element in a Title VII case. Indeed, it appears that they could

not, for the question of intent was disposed of by the former Fifth Circuit in 1979. In Scott v. City of Anniston, Alabama, 597 F.2d 897 (5th Cir. 1979), cert. denied, 446 U.S. 917 (1980), defendants put forward the same argument used here. In response, Judge Rubin wrote:

> We hold, on both principle and authority, that proof of intentional discrimination is not essential to recovery in a Title VII action even when the employer is a government agency, and that the requirement of equal employment opportunity prohibits all invidious employment practices, even those not intended to achieve a prohibited end.

To the extent that plaintiffs' Title VII claim can be considered a disparate treatment claim rather than a disparate impact claim, proof of discriminatory motive would be necessary. Burdine v. Texas Department of Community Affairs, 608 F.2d 563, 566 (5th Cir. 1979). This requires proof that plaintiff was treated

differently because of gender. Id. If reconsideration and clarification of the court's summary judgment order is necessary, the court has no difficulty determining that the State of Florida treated people differently in its retirement system because of their gender. No other reasonable interpretation can be placed on the use of sex-based actuarial tables. The United States Supreme Court in City of Los Angeles Department of Water and Power v. Manhart, 435 U.S. 702 (1978), held that the use of such tables was discriminatory because individuals were treated differently because of the membership in a gender-defined class. Defendant's liability in the case at bar follows from Manhart.

As reflected in the March 16 court order, the only issue remaining in this case is the amount of damages and the

potential impact on the Florida Retirement System (FRS) of a retroactive reward. Plaintiffs and defendants have filed memoranda and affidavits on this question, but there is considerable disagreement between the methods used and the resulting figures. It is apparent that more direction is needed from the court as to the measure of damages and the size of the class. Specifically, the court determines:

(1) Potential class members who previously opted out should, of course, not be included in the calculations of damages in this case.

(2) The measure of damages will be calculated in two ways: first, the difference between the benefits actually paid and those that would have been paid had the FRS adopted the "unisex" tables now in use; second, the "topping up" difference between male and female benefits. For

purposes of the "topping up" method, the calculations shall be done with a change in the gender of the male member only. No change in the gender of the joint annuitant should be considered. The parties should thus agree on two figures, one for the "unisex" level of benefits, and one for "topping up."

(3) The class of retirees entitled to recover damages will be limited to those retiring after April 25, 1978, the date of the Supreme Court decision in Manhart, 435 U.S. 702 (1978). Manhart denied the award of retrosepctive damages for the reasons set out in the previous order. Therefore, had this court awarded damages immediately after Manhart, it would have been limited to prospective-only awards, i.e., only for those retiring after that decision came down. Since this court has determined the law as set forth in Manhart to be

dispositive of this case, damages retrospective from that date would not be appropriate.

With these guidelines, the parties are directed to consult and agree on the proper amount of lump-sum damages for the time period from April 25, 1978, to January 1, 1985 -- taking January 1, 1985, as a hypothetical award date. Parties shall also stipulate to a reasonable rate of interest and the amount of future benefits, separating those to be immediately funded and those to be funded later. The parties are directed to submit their stipulated results to the court no later than May 31, 1984.

With the proper damages amount before the court, a hearing may then be set to determine the potential impact of that amount on the FRS.

It is there ORDERED and ADJUDGED:

1. Defendants' motion for reconsideration (document 2719) is DENIED.

2. The parties are directed to consult and submit the report described in the order no later than May 31, 1984.

DONE and ORDERED this _____ day of April, 1984.

_____
WILLIAM STAFFORD
CHIEF JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

HUGHLAN LONG, et al.,

Plaintiffs,

v. CASE NO. TCA 82-1056

STATE OF FLORIDA, et al.,

Defendants.

_____/

STIPULATION

Pursuant to the terms of the Court's order of April 25, 1984 (Doc. 2726) and subject to the conditions specified in that Order, the parties hereby stipulate and agree:

1. If the Court were to order "topping up" damages to those class members who retired on or after April 25, 1978 and before August, 1983, for the entire benefit payment to such members, changing only the gender of the male class members, and using

the actuarial equivalency factors in effect prior to August 1, 1983, the amounts payable from the Florida Retirement System would be as follows:

a) Principal amounts to class members between April 25, 1978 and December 31, 1984 would be between $15,600,000 and $15,829,000.

b) Interest at 12% simple interest on the principal payments in subparagraph (a) would be between $4,000,000 and $4,559,000.

c) The undiscounted stream of future payments to class members after January 1, 1985 would be approximately $144,200,000.

d) The actuarial present value of future payments to class members on January 1, 1985 would be

between $52,100,000 and $54,272,000.

2. If the Court were to order that class members retiring after April 25, 1978 and before August 1, 1983 were entitled to have their entire benefit adjusted to that indicated by the appropriate unisex values contained in the actuarial equivalency tables adopted by the Florida Retirement System on August 1, 1983, the amounts payable from the Florida Retirement System Trust Fund would be as follows:

a) Principal payments to members between April 25, 1978 and December 31, 1984 would be between $6,400,000 and $6,294,000.

b) Interest at 12% simple interest on the principal payments in subparagraph (a) would be

between $1,700,000 and $1,810,000.

c) The undiscounted stream of future payments to class members after January 1, 1985 would be approximately $57,500,000.

d) The actuarial present value of future payments to class members on January 1, 1985 would be between $21,000,000 and $21,959,000.

3. This stipulation is subject to the positions of the parties stated in their motions for partial reconsideration of the Court's Order of April 25, 1984.

The parties so stipulate this 30th day of May, 1984.

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OCTOBER TERM, 1984

TEACHERS INSURANCE AND ANNUITY ASSOCIATION AND COLLEGE RETIREMENT EQUITIES FUND,
Petitioner

V.

DIANA L. SPIRT, et al.,
Respondents.

Brief of Amicus Curiae Public Employees Retirement System in Support of Petition For Writ of Certiorari to the United States Court of Appeal For The Second Circuit

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QUESTION PRESENTED

Does this Court's decision in *Arizona Governing Committee* v. *Norris* (1983) 463 U.S. ____, 103 S.Ct. 3565, 76 L.Ed.2d 1236 permit the awarding of retroactive relief in pension cases if such relief is defined to include adjustments to future pension benefit payments when the payments are based, in whole or part, on pre-*Norris* contributions?

In the Supreme Court of the United States

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Brief of Amicus Curiae Public Employees Retirement System in Support of Petition For Writ of Certiorari to the United States Court of Appeal For The Second Circuit

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BRIEF OF THE PUBLIC EMPLOYEE'S RETIREMENT SYSTEM IN SUPPORT OF THE PETITION

This brief is filed on behalf of the Public Employees' Retirement System (PERS), an agency of the State of California, in support of the petition for certiorari.

INTEREST OF AMICUS

Amicus is presently a defendant in an action in District Court in which the petitioner seeks retroactive damages for members of a pension fund based on the fact that certain retired members currently receive sexually differentiated benefits.[1] The District Court has pending be-

1. *Retired Public Employees' Association* v. *State of California*, U.S.D.C., N.D. Calif. No. C-77-2008 WHO. The action was remanded to the District Court by the Ninth Circuit following this Court's granting of a petition for a writ of certiorari and then remanding the matter to the Ninth Circuit for further consideration in light of this Court's decision in *Norris. State of California v. Retired Public Employees Association* (1980) 103 S.Ct. 3492.

before it cross-motions for summary judgment. The motions deal almost exclusively with the effect of *Norris* on the petitioner's request for retroactive damages in the form of adjustments to future benefit payments. It appears virtually certain that regardless of how the District Court rules the matter will be appealed to the Ninth Circuit; clarification of this Court's *Norris* ruling, and its subsequent interpretation by the Second Circuit is thus of great importance to this amicus.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported in 735 F.2d 23. An earlier opinion by the Second Circuit is reported at 691 F.2d 1054 (1982). The United States District Court for the Southern District of New York issued five opinions; (1) January 23, 1976 (not officially reported); (2) July 1, 1976 (reported at 416 F. Supp. 1019); (3-4) August 9, and September 12, 1979 (reported at 475 F. Supp. 1298); and (5) March 19, 1982 (reported at 93 F.R.D. 627).

JURISDICTION

The petition for certiorari was filed July 11, 1984, following entry of judgment on May 21, 1984. The time for filing responses to the petition for certiorari was extended to, and including, September 9, 1984, by a letter of August 3, 1984, to the Solicitor General from the Clerk of the Court. Jurisdiction is invoked pursuant to 28 U.S.C. section 1254(1).

STATUTE INVOLVED

Section 703(a)(1) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2(a)(1) (1982), which provides in relevant part:

It shall be an unlawful employment practice for an employer—

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms,

conditions, or privileges of employment, because of such indivual's race, color, religion, sex, or national origin....

REASON FOR GRANTING THE WRIT

IN THE RETIRED PUBLIC EMPLOYEES CASE THE DISTRICT COURT HAS BEEN SQUARELY PRESENTED WITH THE QUESTION OF WHETHER OR NOT THIS COURT'S HOLDING REGARDING NONRETROACTIVITY OF ITS *NORRIS* DECISION APPLIES TO ALL PENSION PLANS

Retired Public Employee defendants have argued, in support of their summary judgment motion, that this court's holding regarding the nonretroactivity of damage awards in pension cases was intended to be uniformly applied. Relying on Justice Powell's statement that "as in *Manhart* holding employers liable retroactively would have devastating results. The holding applies to all employer-sponsored plans" (77 L.Ed.2d at 1263) combined with Justice O'Connor's statement that "ultimately, I find this case controlled by the same principles of Title VII articulated by the Court in *Manhart*" (77 L.Ed.2d at 1265) defendants argued that retroactive damages were not to be awarded in any pension case.[2]

But plaintiffs in *Retired Public Employees* have attempted to distinguish *Norris* on three bases. "First, *Norris* is an employer-operated pension plan." "Second, *Norris* is not a refund plan." And third "in the instant case, there is absolutely no question that the 'insurance exception' is inapplicable." Thus in *Retired Public Employees*, as in *Spirt*, plaintiffs seek to limit the general applicability of *Norris*.

In spite of distinctions between *Spirt* and *Retired Pub-*

2. Defendants in *Retired Public Employees* have accepted Justice O'Connor's ruling "that benefits derived from contributions collected after the effective date of our judgment [must] be calculated without regard to the sex of the employee." 77 L.Ed.2d at 1266. The entire focus of the action after remand by this court has been on the possibility of awarding damages based on contributions collected before the effective date of the *Norris* decision.

lic Employees the crucial similarity remains that in both cases the courts have been asked to apply the *Norris* decision on a case-by-case basis rather than giving the remedy holding of *Norris* universal applicability to all pension plans.[3] Accordingly amicus vigorously urges this court to grant the petition for certiorari filed in *Spirt* to resolve at least this one crucial issue: Are the lower courts free to examine each pension plan to ascertain similarities to, and differences with, *Norris* and then fashion specific remedies for each case based on those similarities and differences or is the *Norris* holding regarding non-retroactivity of damages to be uniformily applied to Title VII sex discrimination cases involving pension funds.[4]

Respectfully submitted,

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3. *Spirt* and *Retired Public Employees* do differ in that no insurance company is involved in *Retired Public Employees*. Also *Retired Public Employees* differs from both *Norris* and *Spirt* in that in *Retired Public Employees* no sexually differentiated pension benefits have been paid to any individual since January 1, 1977. All employees retiring since January 1, 1977 have received sexually undifferentiated pension benefits without reference to the dates of the individual's contributions.

4. Amicus does not argue that this court should reject the other issues raised by the petition for certiorari but merely stresses the importance of this issue.

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Petitioners,

v.

DIANA L. SPIRT, *et al.*,
Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF THE AMERICAN COUNCIL ON EDUCATION AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION

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On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

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BRIEF OF THE AMERICAN COUNCIL ON EDUCATION AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION

CONSENT TO FILING

This Amici brief is filed, pursuant to Supreme Court Rule 42(2), with the written consent of both parties. Letters to that effect have been filed with the Clerk of this Court.

PRELIMINARY STATEMENT

The American Council on Education submits this brief as *amicus curiae* in support of the petition for writ of certiorari filed herein by Teachers Insurance and Annuity Association and College Retirement Equities Fund. Consent for the filing of this brief has been obtained from

counsel for all parties and has been filed with the Clerk of this Court. This brief stresses the need for a final decision on the question of retroactive relief uniformly applicable in all jurisdictions and binding upon all owners of annuity contracts issued nationwide by TIAA-CREF. For the reasons stated herein, this Court should grant certiorari and review the ruling of the Second Circuit.

INTEREST OF THE *AMICUS CURIAE*

The American Council on Education ("ACE") is the principal, independent nonprofit coordinating body for post-secondary education in the United States. Its members comprise 1,700 colleges, universities, and national and regional education associations. The ACE serves as the principal organization of college and university administrators with institution-wide responsibilities, notably presidents, chancellors, and heads of postsecondary associations. Among its charter purposes is to serve education for the common welfare.

A substantial number of ACE's college and university members have retirement programs funded through TIAA-CREF annuities. TIAA-CREF annuities are particularly tailored to the needs of individual members of the academic community. Moreover, the uniform administration of TIAA-CREF's standard individual annuity contracts fosters career mobility of professors and administrators (through portability of their retirement benefits) among more than 3,400 educational institutions throughout the United States. As more fully set forth below, the lack of a definitive ruling applicable throughout the TIAA-CREF system threatens this uniformity of benefits and pension administration to the detriment of over 700,000 employees of higher education. ACE's Board of Directors has consistently opposed retroactivity, an issue that will be fully briefed and argued by the Parties if the petition for certiorari is granted.

SUMMARY OF THE ARGUMENT

The ACE urges this Court to grant TIAA-CREF's Petition herein because without a definitive ruling from this Court the nationwide TIAA-CREF system will likely face divergent decisions in the various circuits relating to the appropriate relief to be granted. Until all such questions are resolved, all TIAA-CREF annuitants (retired and unretired) will be subjected to uncertainty in the terms of their retirement benefits. It is also possible that the higher education retirement system could be fragmented with some annuitants entitled to greater benefits than others, even though similarly situated. It could thus become more attractive to retire from a school in one Circuit than from one in another, restricting freedom of faculty mobility which is uniformly acknowledged as one of the most attractive aspects of the present uniform TIAA-CREF system.

ARGUMENT

This Court Should Grant Certiorari And Decide, For The Benefit Of All Annuitants And Institutions In The TIAA-CREF System, Whether The Relief Granted Below Was Proper

The litigation involving TIAA-CREF's use of sex-distinct mortality tables in the calculation of annuity benefits has existed for over ten years, with eight actions in addition to *Spirt* presently pending against those insurers in various federal courts. *See* Petition at 12 n.4. The controversy which has embroiled those nonprofit insurers and their annuitants will not end, however, if the pending petition is denied. Other plaintiffs in other Circuits would, in that event, remain free to seek varying forms of relief. This Court should grant certiorari and finally determine the question of the appropriate measure of relief for all TIAA-CREF annuitants and participating

institutions so that this issue, which has remained unresolved in a number of federal courts for more than a decade, may no longer plague this nationwide pension system. *Southeastern Community College* v. *Davis*, 442 U.S. 397, 404 (1979); *Massachusetts Trustees of Eastern Gas & Fuel Associates* v. *United States*, 377 U.S. 235, 237 (1964).

The uniformity in benefit rates and contract terms that exists within the entire TIAA-CREF system is one of its most important and attractive aspects. Job mobility is commonplace in higher education, and is an important guarantor of academic freedom. Professors and instructors often teach at a number of institutions during the course of their careers, act as visiting professors at other institutions, go on sabbatical leave, work for the government, and so forth. The freedom to move from one institution to another, unfettered by concern over forfeiture of pension benefits or the financial ability of a particular institution to fund future pension benefits, is most valuable. The TIAA-CREF annuity system serves this important end admirably.

Once qualifying for a TIAA-CREF annuity, an employee may continue to contribute to it whether employed in higher education or not. While over 3,400 institutions presently fund their pension programs through TIAA-CREF annuities, if an employee transfers to a nonparticipating institution, his or her own contributions may continue if desired, but in no event will benefits be lost if contributions cease. When transferring from one participating institution to another, an annuitant need only inform TIAA-CREF of the change to assure that future contributions from the new employer are properly credited. No additional paper work or waiting period is required. Finally, each dollar contributed to a TIAA-

CREF annuity from whatever source purchases the same level of benefits[1] whether earned at the largest state institution or the smallest private junior college.

The ACE believes that nothing should be done to threaten the uniformity of the TIAA-CREF system and the resulting free portability of annuity benefits. A definitive ruling by this Court establishing the guidelines for relief would end any further efforts to obtain relief different from that, if any, which this Court would find appropriate. Denial of certiorari would not put the issue to rest or assure uniformity of treatment among the 700,000 contract holders in the TIAA-CREF system. Other plaintiffs in other actions against TIAA-CREF may not accept, with no other *quid pro quo*, the Second Circuit's determination of the appropriate form of relief.

Two results detrimental to individual TIAA-CREF annuitants could flow from efforts to obtain varying forms of relief: (1) the system will remain in a state of flux until all questions of relief (pending in remaining TIAA-CREF actions or in new actions to be filed) are resolved; and (2) if different measures of relief are awarded against TIAA-CREF, those insurers will be faced with the decision either to confine the costs (and benefits) of such relief to the particular class of plaintiffs there involved or make any necessary changes in all annuity contracts systemwide. If it proved imprudent or impossible to make systemwide changes each time a lower court decides that additional or different relief should be awarded to a particular sub-group of annuitants from the awarded by a

---

[1] Contributions to TIAA-CREF credited on or after August 1, 1983 purchase benefits that do not differ on the basis of the sex of the beneficiary. Consistent with this Court's ruling in *Arizona Governing Committee* v. *Norris*, 103 S.CT. 3492 (1983), pre-August 1, 1983 contributions continue to purchase sex-distinct benefits.

different lower court, the uniformity within the TIAA-CREF system could be lost.

In short, there is a need for one date to be established for compliance with this Court's ruling on liability announced in *Norris*. The annuitants whose retirement decisions are closely tied to the level of their pension benefits deserve to have that certainty of benefits which would flow from a definitive ruling from this Court. Without a common date for compliance all employer-sponsored pension plans, large and small, could become subject to differing obligations (without basis for differentiation) of the same type that threatens the TIAA-CREF system.

CONCLUSION

For all the foregoing reasons, the ACE urges the Court to grant TIAA-CREF's Petition for Certiorari, and to review with systemwide applicability, the May 21, 1984 and September 29, 1982 decisions of the Second Circuit.

Respectfully submitted,

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—v.—

DIANA L. SPIRT, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION

Petitioners Teachers Insurance and Annuity Association and College Retirement Equities Fund ("TIAA-CREF") submit this reply brief in support of their Petition For Certiorari herein.

I. RETROACTIVE RELIEF WOULD VIOLATE THE CONTRACT RIGHTS OF MEN

The briefs filed in opposition to the Petition herein studiously avoid any serious discussion of the injury to

hundreds of thousands of men in the TIAA-CREF system who would be expected to select a single life option at retirement and thus bear the financial burden of the retroactive equalization of benefits ordered by the court below. While apparently conceding that these men will thus suffer an inequity through implementation of the lower court's decision, the EEOC would quibble over its severity. *See* EEOC br. 14n.6. Petitioners submit that the loss to a pensioner of up to 8% of his retirement benefits manifestly is severe to him.[1]

Respondents choose to address the financial impact on TIAA-CREF of the retroactive relief granted below, which has never been an issue in this case. Alternatively it is claimed (*see* EEOC br. 4-7) that TIAA and CREF always have been contractually free to disregard sex in paying annuity benefits. No such finding has been made by the Court of Appeals[2] and the EEOC brief (p.14) to the contrary is wrong. Nor could such a finding be properly made in light of the indisputable factual record. The CREF contracts given to annuitants prior to retirement provide, in pertinent part (JA505[3]):

> The number of Annuity Units on the Annuity Starting Date will depend on the number of Accumu-

---

1 The AAUP, whose interest in raising women's benefits at the expense of the men has been consistent, makes the curious suggestion (br. 5-6) that its participation has provided representation of the male annuitants in this proceeding.

2 The District Court's seemingly contrary position as to CREF (*see* 89a-90a of the Appendix to the Petition) was based upon the erroneous view that an award affecting the value of contributions made in the past was not retroactive. Such an award is "fundamentally retroactive." *Arizona Governing Committee* v. *Norris*, 103 S. Ct. 3492, 3503 [Marshall, J.].

3 Citations to "JA____" refer to pages in the Joint Appendix filed in the Court of Appeals.

> lation Units, the values of Accumulation and Annuity Units, the Optional Type of Annuity Income elected, *the age and sex of the Participant* and in the case of a Survivor Unit-annuity, the age and sex of the Participant's spouse.

(Emphasis added.) The CREF Rules of the Fund which also govern the payment of CREF retirement benefits likewise provide for the payment of sex-distinct benefits. JA513. Similarly, the TIAA contracts state (JA497) as to the guaranteed portion of the benefits that:

> The amount of the initial monthly annuity payment will be determined by the amount of the Accumulation and the applicable Rate Schedule or Schedules; and will depend on the Optional Type of Annuity Income elected, the *age and sex of the Annuitant*, and in the case of a Survivor Annuity, the age and sex of the Annuitant's spouse. (Emphasis added.)

Finally, as to the distribution of TIAA earnings, it would vitiate the foregoing contractual provision if the earnings on the amount guaranteed could be computed on a sex-neutral basis. It beggars common sense to suggest that the total benefit could be determined by two contradictory formulas. Moreover, TIAA has annually committed to its annuitants, in the Report of Annuity Premiums and Benefits sent to each of them, that earnings on pre-August 1, 1983 contributions would be distributed on a sex-distinct basis. JA542-45. In short, a clear contractual obligation exists requiring that *all* bene-

fits, both the guaranteed and dividend portions thereof, be so distributed.[4]

In light of the evident equities created by TIAA-CREF's conduct, its written representations and contracts, it is important to note that the issue of awarding relief against insurance companies in this context has never been reviewed by this Court. Indeed, in commenting on the same form of relief in his brief in response to the pre-*Norris* Petition of TIAA-CREF (br. of January 1983 at 20-21), the Solicitor General admitted that:

> If this Court concludes that it was also proper to award relief against TIAA or CREF . . . it will be necessary as well to consider the propriety of the relief ordered against them. . . .

The earlier conclusion of the Solicitor General, now inexplicably changed, is correct and the lower court's award of relief against TIAA-CREF should be reviewed.

Respondent's "rationale" for retroactively reducing men's benefits is that because they do not know precisely how much they will be receiving during their future retirement anyway, they will never miss it. *See* AAUP br. 4-5; EEOC br. 14-15n.6. This argument has no place in any rational legal system. Furthermore, lack of precise certainty in the amount of future retirement benefits is true of *all* annuities in which, as here, the size of contributions, rate of earnings on amounts contributed, and date of retirement, are flexible. *See* Petition 15. Petitioners submit that this Court in *Norris* meant to cut across individual differences in the multitude of various

---

4 Copies of the TIAA and CREF contracts and the Report of Annuity Premiums and Benefits form have been lodged with the Clerk of the Court and supplied to counsel for the parties.

employer-operated annuity and retirement plans in existence in this country and establish one date—August 1, 1983—for compliance with the prospective relief granted therein. The schools in the TIAA-CREF system have so complied and the men in the TIAA-CREF system should, therefore, be free of any further claims for relief.

II. SPIRT AND PETERS ARE IN CONFLICT

Respondents (EEOC br. 16; AAUP br. 18) seek to dilute the conflict between *Spirt* and the Sixth Circuit's holding in *Peters* v. *Wayne State University*, 691 F.2d 235 (1982), that TIAA and CREF are not employers of their annuitants by stating the obvious—that this Court vacated and remanded *Peters* in light of *Norris*. 103 S. Ct. 3566. Nothing in *Norris* even remotely addressed the application of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, *et seq*. (1982), to employers and their agents, and the definition of those terms. The only other authority contrary to *Peters* on the question was the lower court's decision in *Spirt*, which was cited but obviously not followed by the Sixth Circuit in *Peters*. There is no reason to believe that the Sixth Circuit's holding on this issue would not be reaffirmed and a conflict therefore does exist.[5]

III. DENIAL OF CERTIORARI WILL NOT RESOLVE OTHER CASES PENDING BELOW

The EEOC (br. 15n.7) and the AAUP (br. 16) both suggest that the other eight cases pending against TIAA-

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5 As in the case of the propriety of the retroactive relief granted herein, the Solicitor General also formerly found the question whether TIAA-CREF were employers within the meaning of Title VII to be "worthy of review by this Court." Br. of January 1983 at 21. Again, we believe his earlier conclusion to be correct and the circumstances underlying it unchanged since it was first expressed.

CREF in the lower federal courts (*see* Petition 12n.4) will be "immediately" resolved should certiorari be denied. Such an eventuality is, in fact, most unlikely. Rather, it can be anticipated that plaintiffs in the other actions would in that circumstance seek to make the relief granted in *Spirt* merely the floor upon which claims for more retroactive relief will be piled. The ACLU representing plaintiffs in *Peters* have indicated that this is precisely how they intend to proceed in the Sixth Circuit.[6] The Second Circuit's decision has obscured the clarity of the August 1, 1983 compliance date established in *Norris* and it should be reviewed and reversed.

IV. THE McCARRAN-FERGUSON ACT BARS THE ENTRY OF RETROACTIVE RELIEF

Contrary to the AAUP's suggestion (br. 9n.22, selectively quoting Justice Marshall's opinion (103 S. Ct. at 3500n.17)), *Norris* did not "lay the [McCarran-Ferguson issue] to rest." As is obvious from reading the entirety of Justice Marshall's footnote, he was not there suggesting that the McCarran-Ferguson Act, 15 U.S.C. § 1011, *et seq.* (1982), was incapable of shielding insurers from Title VII, but only that in the absence of any insurers as parties in *Norris* the Act was there inapplicable. Indeed, Justice Marshall later commented that "our judgment will in no way preclude any insurance company from offering annuity benefits that are calculated on the basis of sex-segregated actuarial tables." *Id.*

---

6 In its letter to the District Court of May 23, 1984 (fn. p. 2), the ACLU stated: "The *Spirt* case involved only deferred annuitants. . . . For those issues remaining for the portion of the class [in *Peters*] who retired prior to May 1980, plaintiffs would seek to proceed, upon compliance by TIAA-CREF with the judgment in *Spirt*, with resolution of related factual and legal issues regarding the relief due such retirees." A copy of the ACLU's letter has been lodged with the Clerk of the Court and copies supplied to all counsel.

The central McCarran-Ferguson issue herein—the judicial alteration of the statutes' scope—has not been addressed by Respondents. This issue does not call into question Congressional intent, as suggested by the court below (28a) and respondent Spirt (br. 16), because the intent of Congress in its use of the words "No Act of Congress" in the statute does not admit of any ambiguity. The Second Circuit has reworded the Act contrary to its meaning and brought uncertainty to the scope of the Act's protection. *See* Petition 18-21. This Court should grant certiorari and reverse this destructive interpretation of an important federal statute.

CONCLUSION

For all the foregoing reasons and those expressed in their Petition herein, we urge that a writ of certiorari issue to review the May 21, 1984 and September 29, 1982 decisions of the Second Circuit.

Respectfully submitted,

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